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REPORT OF CASES
DECIDED IN THE
COURT OF KING'S BENCH
OF
UPPER CANADA.

BY
WILLIAM HENRY DRAPER, ESQ.,
BARRISTER AT LAW.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM 10 GEO. IV., TO EASTER TERM 1 WM. IV.;
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

SECOND EDITION.

REVISED AND CORRECTED BY THE REPORTER,
WITH THE ADDITION OF NOTES OF VARIOUS CASES BEARING ON
THE DECISIONS REPORTED

TORONTO:
HENRY ROWSELL.
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J U D G E S
OF
THE COURT OF KING'S BENCH
DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN BEVERLEY ROBINSON, *Chief Justice.*

„ LEVIUS PETERS SHERWOOD,
„ JAMES BUCHANAN MACAULAY, } *Puisne Judges.*

Attorney-General.

HENRY JOHN BOULTON, ESQ.

Solicitor-General.

CHRISTOPHER ALEXANDER HAGERMAN, ESQ.

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UPPER CANADA REPORTS IN THE KING'S BENCH.

CASES DETERMINED IN MICHAELMAS TERM,
10 GEO. IV.

Present :

THE HON. JOHN BEVERLEY ROBINSON, Chief Justice.
“ LEVIUS PETERS SHERWOOD, Judge.
“ JAMES BUCHANAN MACAULAY, Judge.

BERGIN V. THOMPSON.

Where the plaintiff appears by statute for the defendant, a rule to plead cannot be dispensed with. (a)

The court set aside the interlocutory judgment and assessment of damages in this cause upon the following grounds: First, that the affidavit of service of process stated only that there was a notice on the copy explaining the “*intent*” of such service, and not the “*intent and meaning*.” Secondly, that there was no rule to plead, which the court thought requisite by the terms of the statute 2 Geo. IV., ch. 1, in all cases in which the plaintiff appeared for the defendant; and they remarked that this omission was a substantial defect, not a mere irregularity.

In answer to a question which arose in this cause,

(a) *Vide* 4th rule of court made in Easter Term, 11th Geo. IV., *infra*.

the Chief Justice remarked that notice of intention to move to set aside proceedings, as in this case, should be given two days before the commencement of the assizes in which the damages are assessed.

Washburn for plaintiff, *King* for defendant.

CHISHOLM v. SIMPSON.

Motion for costs for not going to trial pursuant to notice.

Per Curiam.—This is a peremptory rule. (a)

CAMPBELL v. MADDEN.

A declaration is not properly filed till it is marked “*filed*” by the proper officer.

The court set aside the interlocutory judgment and assessment of damages without costs under the following circumstances: An appearance had been entered for the defendant, by his attorney, in the office of the Deputy Clerk of the Crown, in the district where the action was brought. This attorney afterwards left the district without appointing any agent therein. Two copies of the declaration were taken to the office of the Deputy Clerk of the Crown, one of which, together with the demand of plea, was put up in the office, the other copy was left there, but the officer did not mark it “*filed*,” nor was he desired to do so at the time it was left.—Interlocutory judgment was signed for want of a plea.

(a) See C. L. P. Act, 1856, sec. 148. Consolidated Statutes, U. C. ch. 22, sec. 223.

The CHIEF JUSTICE considered this as no declaration filed.

SHERWOOD, J., thought no paper regularly filed till marked by the officer.

Draper for plaintiff, *Boswell* for defendant.

CAMPBELL V. HEPBURN.

The court will not amend an original *ca. re.* by making it a *testatum*, although a *præcipe* for a *testatum* is filed where the writ is bailable.

A *præcipe* for an original *ca. re.* directed to the Sheriff of the Home District had been filed, together with a *præcipe* for a *testatum* to the Sheriff of Niagara. By mistake an original was issued to the Sheriff of Niagara, whereon the defendant was arrested and held to bail.

King moved to amend the original thus issued by making it a *testatum*, contending that this was a misprision of the clerk; and there was a *præcipe* to amend by; but

Per Curiam.—This cannot be amended without prejudice to the bail.

Rule refused.

MURRAY V. ORR.

The master is not to refuse to tax K. B. costs merely because the verdict is within the District Court jurisdiction, although the Judge who tried the cause has not certified.

Semble—That defendant should apply for leave to enter a suggestion in order to deprive the plaintiff of his costs.

This was an action of *assumpsit*. The damages

in the declaration were laid at £100.—Plea, *non assumpsit* and notice of set-off. At the trial at the last assizes for the Home District the plaintiff had a verdict for £1, 5s. 7d. The master refused to tax the plaintiff his King's Bench costs.

Washburn now moved for a rule directing the master to tax full costs, and cited *Langham v. Cruikshank*, decided in this court last Easter Term, and cases.—Temp. Hardw. 5.

Ridout resisted the application, on the ground that the judge who tried the cause had not certified under the statute 58 Geo. III., ch. 4, and on the small amount of the verdict.

SHERWOOD, J.—The statute creating the District Courts gives them jurisdiction in cases from 40s. to £15 of unliquidated demands, and to £40 where the amount is liquidated or ascertained by the act of the parties. Now this verdict is below the jurisdiction, and the cause of action, as spread on the record, is beyond the jurisdiction of the District Court. As to what might be decided if this application came from the defendant to resist costs, I give no opinion. As it is, I think the plaintiff is entitled to his King's Bench costs.

MACAULAY, J.—I cannot subscribe to the case in Hardw. to the extent urged, for I cannot agree that the party's own statement on the record shall be considered decisive as to the amount of his claim. *Prima facie*, I take it this court has jurisdiction in every case. Its being restrained is a matter of exception, and the party who claims to

benefit by that exception must take proper steps to bring his case within it. I think this exception should appear in some way upon the record. Suppose one count only in the declaration, and verdict for an amount of the proper competence of the District Court; or for a promissory note of the proper competence of the District Court, with other counts, and a verdict for the note only; or a verdict for goods sold and delivered to £14, and on every other count verdict for the defendant.—In all these cases, by comparing the record and *postea* together, there being no certificate, it would appear that the action might have been instituted in the inferior court. The plaintiff may apply for the certificate or not, as he pleases, but I do not think the master is bound to infer, either from its absence or the small amount of the verdict, that the plaintiff is not entitled to King's Bench costs. The plaintiff's cause of action might be beyond the inferior jurisdiction, and reduced, as in this case, by set-off, to £1, 5s. or less, still the judge cannot certify that this was a case proper to be withdrawn from, when in fact it could not have been brought in the District Court. In all cases where the record and *postea* taken together would not warrant the conclusion that the action was improperly instituted in this court, the proper course for the defendant is, in my opinion, to apply for leave to enter a suggestion on the roll to deprive the plaintiff of his costs. By this means consistency will be preserved, and the matter will appear clearly on the record.—The learned judge cited the following cases as applicable to the question: 3 B. & P. 617; 1 Str. 49; 2 Str. 1120, 1191; 2 H. B. 250; Hullock on Costs, 250.

The Chief Justice having been counsel in the case when at the bar gave no opinion.

Rule absolute. (a)

ANDRUSS V. RITCHIE.

When the word "payable" was omitted in the affidavit to hold to bail, the court set aside the arrest.

The court set aside the arrest in this cause on the defendant filing common bail and engaging to bring no action for a defect in the affidavit to hold to bail; which stated that the defendant was indebted on a promissory note made by him to Burr, Wakeman, and Co., or order, at the Rochester Bank, six months after date; omitting the word "payable."

Attorney-General for plaintiff, *Baldwin* for defendant.

LINDSAY ET AL. V. McFARLING ET AL.

In trespass for *mesne* profits defendant may give in evidence, under the general issue, in mitigation, the value of buildings erected on the premises by him.

This was an action for *mesne* profits, tried at the last assizes for the Eastern District, before *Sherwood*, J. On the trial the judge refused to allow the defendants to give in evidence, in mitigation of damages, the value of certain buildings they had erected on the premises. Verdict for plaintiff.

Bidwell had obtained a rule *nisi* to set aside the

(a) See *Gardner v. Stoddard*, *infra*.

verdict, and for a new trial, for the improper rejection of this evidence.

The Solicitor-General shewed cause. The jury are not limited to the amount proved in giving damages; they may go beyond the mere rent of the premises. 3 Wils. 118; Doug. 584: Adam's Eject. 337. The costs of the ejectment, and not merely the taxed costs, may be given in evidence. In this case much expense has been incurred beyond the costs taxed, and the damages are under £21. The action being sustainable, some damages must have been given, and the court cannot say the sum rendered is unreasonable. No evidence of this sort appears to have been admitted in any reported case; and the very buildings, the value of which the defendants seek to have allowed to them, form part of the estate which was recovered in the ejectment. In order to have availed themselves of this mitigation the defendants should have pleaded that these buildings were taken in full satisfaction of the *mesne* profits, not offered the facts in evidence under the general issue; the plaintiffs then, if they persisted, would have recovered nominal damages only,—4 Taunt. 459. The plaintiffs were clearly entitled to the *mesne* profits from the time of the demise laid in the ejectment. The defendants in erecting these buildings committed a trespass, and cannot therefore call upon the plaintiffs to pay for them.

Bidwell, contra. The amount of damages is not the question now. The point in discussion is, was this evidence properly rejected or not? and this was what the defendants had leave to move. It was

proved that the defendants went into possession innocently, and with the plaintiffs' approbation—surely, this being the case, the value of the buildings erected should have been taken into consideration in mitigation of damages, although it could not, as matter of right, be claimed for the plaintiffs. It is argued that the jury may consider extraneous matter to increase, then why not to mitigate damages. This matter could not have been pleaded; it could only have been given in evidence under the general issue. 2 Bac. abr. damages, B. Godb. 53. If *disseisor* fells trees and makes repairs, such repairs shall be allowed in damages. Com. dig. Trover, G. 6.

THE CHIEF JUSTICE.—I think this evidence proper to have gone to the jury; it would most probably have materially affected the verdict.

SHERWOOD, J.—On reflection I think this evidence should have been received at the trial. At that time it struck me that the erection of this house was a trespass, and therefore could not be taken into consideration, but I am now of a different opinion, and agree that there should be a new trial.

MACAULAY, J., expressed no opinion.

It was afterwards directed by the court that the rule for a new trial should be made absolute, without costs, unless the plaintiffs would reduce their damages to forty shillings sterling, and enter their judgment accordingly, which they afterwards did. (a)

(a) See *Patterson v. Reardon*, 7 U. C. Q. B. 326.

BURFORD V. OLIVER.

In case for disturbing plaintiff's ferry, it is not necessary to prove that the defendant either received or claimed any hire or payment.

Action on the case for disturbance of the plaintiff's ferry. At the trial, evidence was given that the defendant carried passengers, goods, &c. The plaintiff's right to the ferry was also proved, but no evidence was offered to the jury that the defendant either received or claimed any hire or payment. The defendant's counsel objected that such proof was necessary, and this point was reserved for the opinion of the court, which was this day delivered by

THE CHIEF JUSTICE.—The single point referred to the decision of this court is, whether in an action on the case for disturbance of the plaintiff's ferry it is necessary to aver that the defendant ferried for hire or gain. In the declaration there are counts containing such an averment, and others in which it is omitted; but upon the trial it seems, although abundant evidence was given of the carrying passengers and their goods by the defendant, to the manifest injury of the plaintiff, there was no proof that gain accrued to the defendant, or that he stipulated for any hire, and upon an objection that such proof was necessary, the point was reserved at *nisi prius*. Upon argument no authority has been produced to shew that such evidence is necessary to sustain the action, and upon reason and principle it cannot be required. The case of *Blisset v. Hart*, Willes 508, is so far satisfactory on this point that

the declaration in that cause contained no such averment; and though various exceptions were raised, none of them proceeded on that ground, and after mature consideration that declaration was sustained. In the case in 4 T. R. 666, there was no such averment; but though in other cases such averments have been introduced, because the facts happened to be consistent with them, it cannot be reasonably inferred that they are necessary in all cases to sustain the action. With respect to fairs and markets the same question might arise. More cases are to be found under that head than respecting ferries, and they commonly proceed on the same principle. In 2 Saund. 172, there is a case of this description which shews clearly that the true question in such actions is, whether an injury has been done to the plaintiff's right. In that case the plaintiff had a franchise of a market to be held every Wednesday, with right to tolls, stallage, &c. The defendant, without right, held a market in the same place every Tuesday. It was contended that this was no direct contravention of the plaintiff's privilege. But the court adjudged that by forestalling the plaintiff's market it might do him more injury than if held on the same day, and that whether nuisance or not was the question with the jury. So here, the carrying gratuitously, if the case really was so, was probably a much greater injury to the plaintiff (as was urged in argument) than if tolls had been charged. It will be found also that in the case in Saunders, just alluded to, there is no averment that defendant charged or received any thing for the stalls in his market, or that he erected them for gain. Upon the reason of the thing, many consider-

ations occur upon very slight reflection, but they are so obvious that it is unnecessary to state them. We think the point is clearly with the plaintiff.

Per Curiam.—Judgment for the plaintiff. (a)

MOFFAT ET AL., EXECUTORS OF PATERSON, v.
MCCREA ET AL.

In an action for use and occupation, a declaration which stated the occupation to have been by A. B., at the special instance and request of the defendants, *held* good on motion in arrest of judgment, though it was not averred that A. B. was tenant to the defendants, nor that defendants held under the plaintiffs.

This was an action for use and occupation. The declaration stated that defendant was attached to answer to plaintiffs, executors of one Paterson, and was indebted for the use and occupation of certain premises held, used, occupied, &c., by one A. B. at the special instance and request of defendants. Interlocutory judgment had been signed and damages assessed at the last assizes for the Bathurst District.

The Attorney-General had obtained a rule *nisi* to arrest the judgment, and in the meantime to stay the proceedings; and now no cause being shewn, moved to make it absolute as a matter of course, without argument, which the court refused unless some substantial objections were shewn to the record. He then urged that the declaration does not shew that A. B. who occupied the premises was tenant to the defendants, nor that the defendants held under the plaintiffs. It cannot be inferred that such was the case—the more apparent inference is

(a) See *Peter v. Kendall*, 6 B. & C. 703; *Trotter v. Harris*, 2 Y. & J. 285.

that the defendants were mere guarantees for the payment of the rent. This is not within the statute of use and occupation. It also appears on the record that plaintiffs have no right to claim the rent of these premises. I admit that in an action of this sort the tenant is precluded from denying the title of his landlord; but here the plaintiffs have spread the fact on the record, and the court must take notice of it. They shew that they were the executors of Paterson; now on that shewing, if defendants were liable at all, it must be to Paterson's heir. Plaintiffs were not bound to shew title, but having done so, the court will see that it is defective and bad.

CHIEF JUSTICE.—An action for use and occupation would be sustainable, stating the use and occupation to have been by a third party. This would also be the case though in point of fact the premises were empty. Although the defendants might be liable to another person for the rent of the premises, yet if A. lets B. into the possession of premises to which he has no right, he may maintain this action. Upon this declaration it is competent for the plaintiffs to prove that by the will of Paterson they were entitled to this rent without pleading the fact—and the objection comes after an interlocutory judgment. There is another objection which has not been noticed in argument, which is the want of any statement or averment that the premises were occupied with the consent of the plaintiffs. I am however inclined to think that the statement of the occupation by A. B. at the special instance and request of the defendants is sufficient, as I think it implies that the defendants requested the plaintiffs to permit A. B. to occupy.

SHERWOOD, J., concurred in thinking the declaration good.

MACAULAY, J.—I think there is no averment of permission to occupy sufficient to support this action. It is true the plaintiffs need not have the legal title in them to maintain it, as the defendants cannot contest the title of those by whose permission they occupied. 5 T. R. 4; 10 East. 352; but the plaintiffs must state with correctness by whose permission the defendants occupied. 1 Camp. N.P. C. 466; 2 Stark, N. P. C. 356. For the plaintiff, unless the defendant came in under him, or recognized his title, can only recover from the time the legal estate is vested in him. I certainly think the permission of the plaintiffs is a substantive averment and necessary to be proved. No action would be sustainable by the plaintiffs upon a request made by the defendants to Paterson, and it does not appear that the permission to occupy was after his death given by the plaintiffs as his executors. The occupation, for all that is shown to the contrary, might be under a permission given by Paterson. The plaintiffs do not shew that they were ever recognized as landlords by the defendants.

Per Curiam.—(MACAULAY, J., dissenting.)—Rule nisi discharged.

[*William Henry Draper, Esq.*, was appointed Reporter to the Court this term, in the room of *Simon Washburn, Esq.*, resigned.]

HILARY TERM, 10 GEO. IV., 1829.

Present :

THE HON. JOHN BEVERLEY ROBINSON, Chief Justice.

“ LEVIUS PETERS SHERWOOD, Judge.

“ JAMES BUCHANAN MACAULAY, Judge.

EVANS ET AL. v. SHAW.

To an action on a bond for the limits by the assignee of the sheriff, the bail pleaded, 1st. That the debtor left the limits without the knowledge of the bail, and before the commencement of this suit, and before the assignment the debtor returned, and after such return remained upon the limits; and before this suit, and before the assignment, the bail surrendered, and the sheriff received him into custody in satisfaction and discharge of the bond. 2nd. The same down to the statement of the debtor's return to the limits, and then averring that after the return the debtor remained within the limits in the custody of the sheriff until the commencement of this suit. *Held* bad on demurrer.

This cause had been argued last term, and judgment was deferred till now. It was an action of debt for £40, on a bond given by defendant to the sheriff of the Midland District, conditioned that L. A., who was in execution on a *ca. sa.* issued out of the Midland District court, should not go or remove beyond the limits. The declaration alleged that L. A. did go and remove beyond the limits during his confinement at the suit of the plaintiffs, and did withdraw and depart from and out of said limits. After Oyer—defendant pleads that L. A. departed from the said limits privately and without defendant's knowledge, and avers that before the commencement of this suit, and before the assignment of the bond from sheriff to plaintiffs, and before defendant had notice of L. A.'s departing from the said limits, he returned, and continually after his return he remained within the said limits, until afterwards and before the commencement of this suit, and before

the assignment of the said bond, defendant surrendered L. A., and the sheriff received him into his custody in full satisfaction and discharge of the said bond, with an averment of notice to plaintiffs, and of identity. Second plea the same as the first, to L. A.'s return, and averring that continually after his return L. A. remained within the said limits in the custody of the said sheriff until the commencement of this suit. To both pleas there was a general demurrer. The question arose on the construction of the provincial statute 2 Geo. IV., ch. 6, which recited the expediency of assigning limits in which debtors may have the benefit of exercise and air, without subjecting the sheriff to an action for escape, enacts that justices in quarter sessions may appoint limits not exceeding six acres, and that debtors may be or remain at any part or place within such limits without subjecting the sheriff to an action for escape from such gaol or limits; but it shall not be incumbent on the sheriff to allow any debtor the use and benefit of such limits unless he shall furnish good and sufficient security that he will not at any time during his confinement go or remove beyond such limits. By *2nd section*.—If any debtor who may have given security, &c., shall withdraw or depart from or out of such limits, it shall be lawful for the sheriff from whose custody he shall so withdraw, to sue such debtor and bail, &c. By *3rd section*.—The sheriff is bound, on such debtor so withdrawing or departing, to assign such security to the plaintiff if required.

This act is amended by the 7th Geo. IV., ch. 7, which enacts that it shall be lawful for any person

having given security to the sheriff for any person to enjoy the limits, to surrender such prisoner into the hands of the sheriff, his deputy or gaoler, and upon such surrender the sheriff shall deliver up, &c., the bond or security given to him by such person, so that he shall be wholly discharged therefrom. Provided always, that nothing therein contained shall be construed to prevent the sheriff from renewing such security in the same manner as if such prisoner had not enjoyed the limits, &c.

The *Solicitor-General* in support of the demurrer. In England it is true that an action could not be sustained against the Marshal in K. B., who pleaded a plea similar to the above. But there the security is not assignable. Here the statute makes it so. The condition of the bond is not leaving the limits—if this be done the bond is forfeited and the leave or knowledge of the bail is immaterial. If it were otherwise a party might continually slip off the limits and return. The forfeiture of the bond clearly takes place when the defendant leaves the limits, and his subsequent return cannot cure it. The security is not merely to the sheriff, but to the creditor. Cited 2 T. R. 126; 5 T. R. 37; 2 C. & P. 539.

Bidwell, contra. The demurrer admits the facts stated in both pleas. It is not indeed averred that L. A. remained in the sheriff's custody in gaol till the commencement of this suit, but that is implied in the averment that the sheriff received him into custody in full satisfaction and discharge of the bond. In 11 Ea. 406, it was held that an averment

that the sheriff detained prisoner without stating how long was a sufficient averment of detention until the commencement of the suit. So the averment that the defendant surrendered L. A. into the sheriff's custody, and that the sheriff received him in discharge of the bond, implies a detention until the commencement of this suit; at all events, it appears from the pleadings that the escape was not voluntary but negligent. This appears from analogy in the case in 2 T. R. 126. It is clear that a return of a prisoner to custody before action is brought is a bar to a suit against the sheriff. The sheriff then would not be liable to the plaintiffs. If so, why should his security? The 2nd Geo. IV., ch. 6, was passed for a humane purpose, to give the debtor certain liberty without subjecting the sheriff to an action. If, then, in this case the sheriff would not have been liable, he could not have maintained an action against his bail. If he had no right of action, his assignees cannot be in a better situation, especially as the plaintiffs had notice. But further, when the surrender to the sheriff took place, he alone had a right of action, and this is discharged and realised by his accepting the prisoner in the manner stated in the pleas. This was an actual executed satisfaction, and its legal effect is the same as if the bond had been given up to the defendant.

CHIEF JUSTICE.—This is an action brought by the plaintiffs, as assignees of the sheriff of the Midland District, upon a bond given under our provincial statute 2 Geo. IV., ch. 6, by a prisoner, and the defendant, his surety, upon occasion of the former obtaining the indulgence of the gaol limits. The

bond is not denied by the defendant, but he pleads two special pleas, setting forth, &c. (as stated). The question upon the general demurrer to these pleas is whether either of them is a bar to the plaintiffs' recovery, and it is a question which must be decided without the aid of cases precisely in point, because in England the same circumstances cannot occur. I am not aware that any decision involving this question has taken place here. The court are strongly impressed with the importance of the principles which it involves, and my brothers and myself have anxiously endeavoured to bring our minds to the same conclusion upon it; but I regret to say we have not succeeded in that attempt, and it therefore only remains that we declare the opinions which we have severally formed. In my judgment, the matter set forth in these pleas is no bar to the plaintiffs' action, and though I may think it reasonable, and perhaps desirable, that the facts pleaded should constitute a good legal defence, I cannot satisfy myself that upon any sufficient authority I can determine that in law they do so. Great solemnity is attached to contracts under seal, and the law deals with them in a manner which partakes of mathematical precision. Here the defendant has executed a bond to the plaintiffs, or rather a bond which under the statute has been assigned to the plaintiffs, in the penalty of £40; but the plaintiffs' right to sue upon the bond is subject to this condition—that if a certain prisoner who has been allowed the gaol limits, shall not depart from those limits, so long as he remains confined at the suit of the plaintiffs in the original action, this bond shall be void. The

plaintiffs sue upon this bond, averring that the condition has been broken and is gone, and that their right of action is therefore absolute, and stands discharged from that condition or defeasance. The defendant neither denies that he executed the bond, nor does he plead that it was illegal, or that it was fraudulently obtained, nor does he pretend that the condition was kept; on the contrary, he admits that in fact the condition has been broken, and he relies for his defence upon something that has been done since the breach. The prisoner, he says, departed, it is true, but it was without his knowledge; that he returned also without his knowledge; that he (the defendant) surrendered the prisoner to the custody of the sheriff, who has received him and holds him, and that all this was before the action was brought, and before this bond was assigned by the sheriff to the plaintiffs, the creditors in the original action. Now, considering the strictness that prevails in pleading upon specialities, in which many equitable defences that may be entertained in actions of assumpsit, or debt on single contracts are of no avail, I cannot see upon what authority the matter pleaded here can be adjudged to be a bar to the plaintiffs' recovery. It cannot be upon the principle which governs the court in interposing on various grounds to relieve bail to the sheriff upon *mesne* process, even after the assignment of the bail bond and an action brought upon it, neither can it be upon the same principle upon which the court relieves bail above after a *sci. fa.* is brought upon their recognizance; because in the one instance the power of extending relief is given by the express terms of a statute, and in the other the court ground their

right to interpose upon the principle that a recognizance is a record of their own court over which they can exercise such a control as to prevent it, being used oppressively or unjustly. And besides, in both these instances the court interposes upon motion, and it is expressly declared that the relief which they extend in that manner could not be obtained by pleading after the condition of the bond or recognizance has been broken, because the ground on which they interfere would form no bar to the plaintiffs' action; and therefore it is, that although after a *scifa.* brought the bail may surrender their principal upon motion, and obtain an *exoneretur* and stay of proceedings, they could not plead such a surrender in bar as they may when they have surrendered the principal upon the return of the *non est inv.* to the *ca. sa.*—1 *Ld. Raym.* 157.

Then it remains to be considered whether our provincial statutes with respect to gaol limits authorise us to treat a surrender, after the bond has been forfeited, as a discharge or satisfaction of the obligation. The statute 7 Geo. IV., ch. 7, expressly empowers the surety to render the prisoner in discharge of his bond, and the question is, whether it gives the surety power to do this, and thereby bar the plaintiffs' action against him after the bond has been broken? If we could fairly discover from anything in the act that the legislature had that intention we should be bound to give effect to it; but without pretending to conjecture what may have been meant further than the language furnishes us with a guide, I cannot discern such an intention, and I do not myself feel authorised to supply it

from implication, contrary to the contract of the parties in the bond, and contrary to the principles of the common law, which certainly would not recognise in the matter pleaded here any legal defence to the action. The case of *Bonafous v. Walker* (2 T. R.) is good authority to shew that in an action of escape against the sheriff, a retaking on fresh pursuit, or a voluntary return, which is equivalent, may be pleaded in bar, but for obvious reasons it is inapplicable here; while the case of *Chambers and Gambier*, cited in it from *Com. Rep.*, though it is loosely stated, tends strongly to shew that in this action the surrender is no defence. If it be thought reasonable, on the other hand, that it should be a bar, it ought to be considered that the granting the limits is an indulgence which in some cases may have a tendency to diminish the creditor's chance of obtaining payment of his debt, and therefore it is due to the creditor that abuse should be guarded against by rigorously enforcing the conditions upon which the indulgence is granted. I am not, therefore, certain that it would be safe to found my judgment upon a presumption that the legislature intended to give the right to surrender after breach of the condition; and at any rate, as I see nothing to indicate such an intention, I am in favour of the demurrer.

SHERWOOD, J.—(After stating the case)—It appears to me that the principal question in this case is whether the bail for the limits are liable to the creditors in a case where the sheriff is not at any time liable. It is my opinion that the bail are entitled to equal protection with the sheriff. Under

the first act (2 Geo. IV., ch. 6) I should feel great doubt whether the defendant is liable in this action. This act directs the sheriff, if required by the plaintiff, to assign to him the security on the debtor withdrawing or departing from the limits, and I am not at all clear that the sheriff was bound to assign the bond in this case, if the plaintiff did not require him to do so, before the debtor voluntarily returned and was placed by the sheriff in close confinement. The words of the act are, "on such debtor withdrawing or departing" the sheriff shall be bound to assign the security to the plaintiff, which expression makes it at least doubtful in my mind whether the proper construction of the act would not require that the debtor should be proved to have been off the limits at the time the plaintiff demanded the assignment of the security in order to give him an absolute right to such assignment, and to enable him to sustain an action against the sheriff for refusing to assign. It is very clear, however, that this statute does not confer any authority on the bail to imprison the debtor under any circumstances whatsoever. The legislature found it expedient to amend this act by the 7 Geo. IV., ch. 7, by giving the bail the power of taking and surrendering the debtor in their own discharge. It is urged on the part of the plaintiffs that the bail have no authority under this act to take and surrender their principal after he once leaves the limits, even for the shortest space of time, although he may return on the same day, and before any other person has knowledge of his departure. It is also said the power of the bail to surrender the debtor is circumscribed by the gaol limits, and cannot be exercised beyond those bounds.

Before I proceed to state the views which I take of these acts, I will remark that in my opinion they should receive a liberal and equitable construction, according to the rules of the common law respecting special bail, prisoners confined for debt, and the officers themselves charged with the custody of debtors. The statutes now under consideration were made for the relief of prisoners confined for debt, and such acts should be construed equitably.—Burr 747, 901. Suppose the sheriff should allow the debtor to remain on the limits without exacting bail from him, which I think he has an undoubted right to do, if the debtor depart from those limits, and the sheriff should immediately follow and bring him back before any action was commenced for the escape, would the sheriff be liable? I think he would not, if the escape were a negligent one. Now I consider that the intention of the legislature was to give equal power and equal protection to the bail for the limits as regards the creditor, to that which the common law gives to the sheriff for the same purpose; because while the debtor is on the limits he is as much at the risk of the bail as he would be in close confinement at the risk of the sheriff; therefore the reason for protection is as strong in the one case as in the other. It appears to me that the justice and necessity of placing the bail on the same footing with regard to immunity that the sheriff is must have been evident to the legislature; and I therefore conclude that they intended to do so, by the very general words which they have thought proper to use in the creation of the power given to the bail of surrendering the principal. They had no such authority by the first

act, and were left by that statute to rely on the honesty and correct conduct of the debtor, which in many instances were found to be imaginary. This circumstance undoubtedly rendered the obtaining bail for the limits extremely difficult, and in my opinion formed the principal inducement for changing the law. The legislature must have been convinced that nothing could facilitate to the debtor the obtaining bail for the limits more than the conferring on the latter the power to take and return the debtor to close confinement whenever their vigilance should discover, or the conduct of the debtor prove, that his intention was fraudulent, and his design was to abscond. So long as a debtor continues on the limits, there is nothing to indicate any bad intention on his part, and there is little or no probability that his bail would surrender him; and if the legislature really intended that the bail should have the power of taking their principal for the purpose of surrender, no longer than he quietly remained on the limits, I certainly think that they intended to confer but a very small benefit. This, however, is not my opinion. I think the legislature extended their views much farther, and that they intended to allow the bail for the limits the right of taking and surrendering their principal if they found him within or without the limits at any time before the creditor took an assignment of the bail bond or brought an action against the sheriff for an escape. The principal objection to the equitable construction which I give to the statutes in question is this—that the bond is a contract, and the condition of the obligation being once broken, the creditor has an absolute right to an assignment of it from the sheriff, at any time after

the infraction of the contract, and that the sheriff would be liable to an action for refusing to execute the assignment. Now it appears to me the very words of the statute last enacted contain a sufficient answer to this objection, without resorting to the aid of any equitable intendment on the part of the law makers. The expressions are to this effect: "that it shall and may be lawful for the bail to surrender their principal into the hands of the sheriff, who is directed to give up the bail bond upon such surrender." In my opinion it would be difficult to find words more general and extensive in their ordinary acceptation than these are; and I think the legislature contemplated that all courts of law would give a liberal construction to a remedial act conformably to the rules of the common law. The best construction of a statute is to construe it as near the rule and reason of the common law as may be, and by the course which that observes in cases of the same nature.—2 Inst. 148, 301. There is great similarity between the liability of the sheriff and that of the bail for the limits; while the prisoner remains in close confinement he is there at the risk of the sheriff—while he is on the limits he is there at the risk of the bail. If the sheriff allow the debtor to be on the limits without bail, then the situation of the bail is exactly like that of the sheriff. If the debtor in such a case escape from the limits without the knowledge and against the will of the sheriff, and voluntarily return to the limits on the same day, and the sheriff being informed of the fact should place the debtor in close confinement before an action were brought for the escape, I think the sheriff would not be liable. In the present case the first

plea alleged that the prisoner left the limits without the knowledge and against the will of the defendants (his bail), and voluntarily returned on the same day, and before any assignment of the bond took and surrendered the debtor to the sheriff, who received him in custody in full satisfaction and discharge of the obligation. It is alleged, however, that the contract was broken, and therefore the surrender was inoperative under the statute. My answer to this objection is that the words of the statute are sufficiently comprehensive to give the bail, and the legislature intended to give them the full right of surrendering their principal, so long as the bond is not assigned and the sheriff cannot be injured. The sheriff cannot know that the plaintiff will elect to take an assignment of the bond and discharge him until the plaintiff require the assignment according to the words of the first statute; and until this be done he does no injustice by accepting a surrender of the debtor from the bail. The prisoner is again placed in the custody of the sheriff to answer the exigency of the writ upon which he was first arrested; the subsequent liability of the sheriff remains good to the plaintiff, and the things resume the same position which they occupied before the debtor obtained bail for the limits. It may be said, however, that there is a difference in the legal principles which govern the two cases I have just now put—that when a prisoner escapes from the sheriff, the law gives an action to the creditor on the ground that there has been a breach of duty; when a debtor who has bail escapes from the limits, the law gives an action for breach of contract. For my part I discover no essential difference between such a breach of duty and such

a breach of contract; the form of action, it is true, could not be alike in both cases, but the legal effect must be precisely the same to all parties concerned, and the statutes relating to gaol limits, if construed according to the common law, would operate as favourably to the bail in the one case as the common law does to the sheriff in the other. Whether the plaintiff elect to sue the sheriff for the recovery of his debt and costs, or whether he elect to sue the bail for the same purpose, the action in either case is substantially the same, and intended to produce similar effects. I have thus endeavoured to shew that the statutes protect the bail for the limits to as great an extent as the law does the sheriff, and upon the same principles of justice and equity; and farther that it protects them for the benefit and relief of prisoners confined for debt, who might find it extremely difficult, and perhaps impracticable, to obtain bail without such protection. I will now examine whether the bail for the limits have not this right from their analogy to other bail. In civil actions there are three kinds of bail — to the sheriff, to the action, and bail in error. The first and last of these descriptions of bail have no right to take their principal into custody or to surrender him in discharge of themselves, but, like mainpernors at the common law, they can do nothing, but are barely and unconditionally sureties for their principal. Like sureties for the performance of any other act, they become liable when the condition of their obligation is broken, and are entitled to no more favour by the common or statute law than other obligees, with one exception—when the proceedings are by original writ, the bail to the sheriff are not liable to

be sued upon their bond till the fourth day inclusive after the return of the writ.—4 D. & R. 160. Special bail or bail to the action may in some respects be compared to bail for limits. Both are equally responsible for the safe keeping of the debtor—both have the right of surrendering their principal in discharge of themselves, and where either kind exists the plaintiff necessarily has the choice of two remedies for the recovery of his debt, and in my opinion is equally bound to take some step declaratory of that choice before either description of bail become liable to him for the payment of the debt. Special bail undertake by recognizance, which is a high species of contract, that if the defendant be condemned in the action he shall satisfy the costs and condemnation money, or render himself a prisoner to the sheriff, or that they will do it for him—when the plaintiff recovers final judgment for the debt and costs, the defendant is then condemned in the action, and according to the plain words of the contract they must be liable if the defendant should neglect to pay the amount of the judgment, or to render himself a prisoner to the sheriff within a reasonable time, that is, as soon as the existing circumstances of the case would fairly allow. The law, however, is clearly otherwise. The plaintiff has his election of two remedies; he may take out process against the lands or goods of the defendant, or he may have the body of his debtor as a security for the debt. If he wish to make the bail liable he must sue out a *ca. sa.* against the principal, and this is the only means by which he can effect his purpose. The bail are always at liberty to surrender their principal in discharge of themselves till the plaintiff takes this

step. Years may pass without lessening the right of this surrender; it remains good till the writ of *ca. sa.* issues, and if the principal should die before the plaintiff takes out the writ, the bail may plead the occurrence in discharge of the recognizance. An examination of the laws relating to special bail clearly evinces that they have the right of surrender till the plaintiff takes some step indicative of his ultimate determination to sue the bail upon their undertaking by recognizance. It appears to me that the provincial statute which I last cited gives the bail for the limits a similar right of surrender till the plaintiff takes some step equally conclusive of his determination to sue them, or till he actually sues the sheriff, when he is liable for an escape. The taking an assignment of a bail bond is a proceeding which as definitely proves his intention in the latter case as the suing out a *ca. sa.* would in the former, and there is no other step which he could possibly take that would be capable of conveying greater certainty. The legislature, in my opinion, intended to protect bail to an extent commensurate with that which is conceded by the common law to special bail, because, as I have already stated, they have made their liability and power of relief very analogous, and it is not probable they designed to restrict the exercise of that power to such a degree as would almost destroy it. I therefore think in a case circumstanced like the present the penalty of the bond is not forfeited to the plaintiff till he require and obtain from the sheriff an assignment, and that a surrender of the principal by the bail before such event amounts in operation of law to a performance of the condition, and may be pleaded in bar of

an action by the creditors on the bond suggesting a breach of the condition before such assignment. This position, I am perfectly aware, is open to objection. It may be said that the rules of the common law which govern the proceedings on bonds or other specialties are different from those which apply to an action on a recognisance of bail; that the jurisdiction of the courts of law in the latter instance is founded on their inherent authority to take care that no improper use is made of their records; but in the former instance their jurisdiction rests on the strict rules of the common law; that those rules admit of no defence short of the performance of the condition of the obligation, or the release of the penalty by some instrument, whose effect is as solemn and binding as the bond itself. Admitting the force and correctness of such objections, I think the present case is wholly exempted from their operation. The legislature by virtue of their amending statute, as I think, have made the surrender of the debtor to operate as a complete performance of the contract, either before or after its infraction, at any time before the bail are fixed with the debt, in the manner before stated. If this be the effect of the statute, then I think that the legal consequence is that the defendant may plead the fact in bar of any action brought on the bond.

For the legislature to allow a specific act to have the effect of performance of the condition of an obligation, even after it is broken, is by no means anomalous. Many instances of the kind might, perhaps, be produced, but I shall mention only one,

which I think sufficient to shew that the rigidity of the rules of pleading has been relaxed, and the principles of the common law have been set aside by the legislature in England for the purpose of arriving at the justice and equity of a particular case. By the common law a bond given in a penalty conditioned for the payment of a less sum at a stipulated period would become absolutely forfeited if the money were not paid on the day, and a plea of payment after the day would not be available. The statute 4 Ann, ch. 16, sec. 12, gives a remedy in this case, and in substance enacts that if the debt shall have been paid before any action is brought on the obligation, although it was forfeited by the nonpayment of the money, according to the condition, yet it may be pleaded in bar of the action by virtue of the enactment contained in the statute. *Solvit post diem* was no plea before this statute, but the act makes it a good plea now.

I have already expressed my opinion that the statutes relative to bail for the limits were introduced for the sole benefit and relief of debtors confined in gaol, but I cannot think the legislators designed to make any alteration in the remedies which the law gave the creditor. Those remedies were left precisely where the legislature found them. The condition of the creditor was not to be worse, but it was not intended to be made better by increasing his power of compelling payment. The construction which I give the acts has no tendency to abridge the established rights of the creditor. His legal remedy against the property and the body of his debtor remains unim-

paired, while the power of proceeding against the bail for the limits is equitably restrained to those bounds which the law prescribes in cases similar in their nature and alike in their circumstances.

The foregoing remarks on the liability of bail for the limits are intended only for a case where the bail are sued by the original plaintiff on an assignment of the security by the sheriff; if the actions were brought by the sheriff himself, a rule somewhat different in practice though not in principle must necessarily prevail, according to the different circumstances in which the parties would be placed. Upon as full a consideration as I have been able to give the present case I am of opinion the first plea is sustainable, and that the defendant is entitled to judgment on that plea. With respect to the second plea I am of a different opinion; I think it is not good. It contains no averment that the defendant surrendered his principal to the sheriff conformably to the provisions of the statute. Nothing but a surrender before the assignment of the bond in the case now before the court could have the effect, in my opinion, of satisfying the condition of the obligation.

MACAULAY, J.—The first consideration is, how stood the law upon the passing of these acts? *A ca. sa.* could issue as in England, and the sheriff was bound to observe the same duties, and subject to the same liabilities, as in England. By the common law the sheriff and every gaoler ought to keep persons in execution *in salva custodia*, and if he permit an escape, an action lies.—3 Co. 44; 2 Wils.

294; 2 Bl. 1048. At common law, case was the only remedy against a sheriff for an escape in execution on final process, and that form of action must still be adopted when the escape is before final process. But the statute Westm. 2 (13 Edw. 1, c. 11), and 1 Ric. 2, c. 12, gives the action of debt against the sheriff or gaoler to recover the sum for which a prisoner is charged in execution. They do not deprive the party of his action on the case.—Cro. Jac. 288; 1 Saund. 38, n. 2. Debt is, however, generally preferable, as entitling the plaintiff to his whole debt.—2 T. R. 129. In case the damages are in the discretion of the jury.—2 Chit. Rep. 454. To a voluntary escape, re-capture or a voluntary return is no plea. To a negligent escape, re-capture on fresh suit, or a voluntary return before action (but not after), is a good bar.—2 Co. 52; 2 Str. 908; 1 Saund. 35, n. 1. A voluntary return is held tantamount to a capture on fresh suit.—2 T. R. 129; 11 Mod. 341. The obligation of the sheriff arises out of common law liability; the common law remedy was in case for the tort, and re-capture is a good plea (I suppose), as being a full answer to all damages; for if the sheriff, having negligently suffered an escape, promptly pursues and re-takes before action, and has the defendant in custody when action brought, it would seem to negative any damage to the plaintiff. It is true a re-capture may be pleaded in debt, indeed it formerly could be given in evidence under *nil debet*; but this seems an extension of the common law defence to the extended remedy. This defence must now be pleaded and sworn to.—8 & 9 W. III., c. 27, s. 6, and I should think, a plea of voluntary return must be verified

in the same way when urged as a defence.—4 Star. Ev. 1349; Imp. Sheriff, 160-1. No special plea is to be received without affidavit that the escape was without the consent, privity, or knowledge of the sheriff. After a voluntary escape he cannot re-take, and is therefore liable.

It is obvious the law of escape, as between the creditor and the sheriff, rests upon its own principles, and is composed of common law and statutory provisions. A duty is by law cast upon the sheriff; an obligation is by the bail voluntarily assumed; between which a very solid distinction will be found to prevail.—6 T. R. 754; Alleyn, 27; 3 B. & P. 420; 1 T. R. 418. The case in 2 T. R. 126, was an action of debt on the statutes, brought against the marshal, and of course he being charged by these statutes which extended the common law remedy, had an obvious right of defending himself as in other cases of escape. The gist of the action was the escape; the form of action was extended by the statute; an escape in a sheriff is a breach of duty—a tort not a breach of contract. Upon an arrest being made the law imposes it on the sheriff to keep his prisoner safely. If he carelessly suffer him to go at large, the plaintiff has an action, against which a re-capture before suit, thought not after, is an answer; but if the fugitive die before action the sheriff is fixed. In the present case it is a specialty contract. In one case a tort—in the other an agreement; and to be governed by the rules of law applicable to the respective actions. The case in 2 T. R. 126, is in debt, founded on a tortious act by virtue of the statute, and is not in point unless to

prove that the prisoner is in the sheriff's custody, though on the limits, and that he is responsible in the event of escape. Had the sheriff in that case refused to accept his voluntary surrender, and sued the sureties, and they had pleaded the return as a bar, the cases would have been more similar, and we should have known the nature and terms of their engagement. An escape against the bail of the sheriff is a tortious act of the prisoner, for which an action lies by the sheriff; he is not obliged to pursue and retake him, nor is he compellable to accept a voluntary surrender, but may at once sue the party, by reason of his liability to the creditor.—Cro. Eliz. 237, 53, 124, 264; Godbolt, 126; Fitzh. N. B. 130 *b*. So also after a voluntary escape and a voluntary return, though the sheriff cannot detain the defendant, still the plaintiff may admit him in custody, so as to charge the then or subsequent sheriff—1 Vent. 269, 2 Lev. 109, 132—and can, if at large, obtain an escape warrant. He is not obliged to resort to the officer. It is said also that if the sheriff permit a voluntary escape, the subsequent assent of the plaintiff is not a bar to the action. I mention this to shew that an *ex post facto* defence, when admissible, rests upon pre-established rules. It appears to me, if analogies are to be resorted to, the present case must be determined by a consideration of the law of bail in other cases rather than by the law of escapes respecting sheriffs.

The undertaking of bail is a contract, and the contract here was not that L. A. should make no escape, but that “he should *not go or remove beyond the limits*” of the gaol. The breach is that he did

go, remove, withdraw, and depart. The plea admits a departure and seeks to avoid the penalty by avoiding the breach. A departure is doubtless a literal breach of the condition, and if so, the penalty was incurred; but it is contended that the condition was saved by the subsequent render. Such a defence rests, I fear, rather upon equitable than legal grounds. If we look to cases of bail bonds, and bail to the action, we find that nothing can be pleaded to the bond or recognizance after action that does not strike at the root of the contract. A bond may be avoided upon some grounds, so also a recognizance; but the pleas will be found to anticipate the possibility, or deny the fact of any breach. After breach, in the case of bonds, the court is enabled to grant summary relief by stat. 4 & 5 Anne, c. 10. In case of recognizance they exercise a similar control over their own record.—5 B. & A. 192. To an action on the bail bond defendant may plead *comperuit ad diem*; but if the appearance is not entered of record the bond is forfeited.—Cro. Eliz. 460. Or that the bond was taken for ease and favour. Or, if void on the face of it, they may demur; or they may plead no process against the principal; or no affidavit, shewing the arrest illegal and the bond void, as under a species of duress; or that the assignment is not stamped. But matters of defence in equity, or merely founded on the indulgence of the court, are not pleadable; as that the bond was given to plaintiff as trustee for his officer, to whom defendant had paid debt and costs.—7 Ea. 147. Satisfaction after breach cannot be pleaded.—Cro. Eliz. 46; 6 Rep. 43; 2 Wils. 86. If good, it should be pleaded to the condition, not to the bond.—Yel.

192, Cro. Jac. 99, 254. Before the statute 4 Anne, c. 16, *solvit post diem* could not be pleaded to a bond.

The undertaking of special bail is that defendant, if condemned, shall satisfy the debt, or render himself, &c. These bail are discharged, by death of their principal, before the return of a *ca. sa.*, but not if after the writ is returnable.—6 T. R. 284. After judgment plaintiff may elect to proceed against the body or effects of defendant, and owing to this election it has become a settled rule that before proceedings against bail a *ca. sa.* must be sued out and returned *non est inv.* The render ought to be when plaintiff signifies by *ca. sa.* that he will have the body. A render can never be pleaded after the return of a *ca. sa.*—1 L. Raym. 156. Nor would the court formerly accept such render.—1 Cro. Eliz. 738. Indulgence was gradually extended by the court exercising a control over the record.—10 Mod. 267. The forfeiture of the recognizance takes place by not rendering before the return of a *ca. sa.* issued against the principal; when once forfeited it will be found that nothing can be pleaded in bar, predicated upon the breach. Bankruptcy of principal and certificate is no plea, though held an equitable defence.—2 B. & P. 45. The courts have enlarged the time for the render of principal. But a render after the return of *ca. sa.* is no plea in bar. Accepting a *cognovit* will under some circumstances discharge the bail. Yet such matter is not pleaded, but subject of motion.—4 Taunt. 455; 5 Taunt. 319; 7 Taunt. 126; 15 Ea. 616; 4 B. & A. 91. Bail in error cannot render, their contract being absolute; and upon the same principle the defendant here, being liable under the bond upon the departure of

the debtor, cannot render afterwards in discharge of the bond; the right of render is gone. I think the present defendants had a right of surrender so long as the condition of the bond was not infringed; but when once broken (as it was by the departure admitted) the right no longer existed. The act upon render requires the bond to be given up that the bail may be wholly discharged therefrom, *i.e.*, from the bond—not from the condition or consequences of a breach: it contemplates no present forfeiture, as is shewn by what follows, that the sheriff may renew the security as if the debtor had not enjoyed the limits; but if rendered after an escape it is not probable another enlargement would be allowed. Upon breach of the condition the sheriff is bound to assign the bond to plaintiff; and I do not see that the sheriff can by a subsequent acceptance of the original defendant affect the rights of the plaintiff, however he might his own; besides, the detention of defendant may be perfectly consistent with a subsequent assignment.

The plaintiff having a right to resort to the sheriff in his common law liability, he might desire to be in a position to plead a re-capture or a voluntary return. Whether, after plaintiff claims an assignment of the bond, the defendant becomes supersedable, may be a question. On that I give no opinion, though it might appear that plaintiff had a right to detain defendant and proceed against his bail as a collateral remedy till satisfied.—2 T. R. 129; Skin. 582. The sheriff may accept a voluntary render of defendant in discharge of the sheriff's bail before the return of the process, but not after; not after breach of the condition to appear.

—1 Ea. 390 ; 10 Ea. 100. It is not stated in the plea that the departure was with or without the consent of the sheriff, nor does it appear that the render pleaded was made before plaintiff had notice of the departure. The sheriff shall not avail himself of his own irregularity. I find no case in point. The one most resembling it is in Com. Rep. 554 ; *Chambers v. Gambier*—debt on bond—condition, to be a true prisoner without making any escape ; plea, that J. L. did remain a true prisoner without making any escape ; replication, that on the 13th January he made an escape ; rejoinder, that he went a little way out of the rules, and being sent for back, immediately returned, with consent of plaintiff, was received as his prisoner, and so continued ever since. Demurrer,—the rejoinder was held ill as being a departure. *Reeves, C. J.*, said, “If it would have excused the escape it should have been pleaded at first. This plea in the matter of it is no excuse. It is not said he was retaken on fresh suit ; but he returned, being sent for, without saying when, or after what time, or anything certain.” Considering, therefore, the nature of the undertaking, the principles that govern the court in the construction of specialties, and those which seem to have regulated the decisions in cases of bail especially, I am constrained to hold that the present defence is not a good plea in bar of the action on the bond, however desirable I may deem it that the court should possess the power of granting equitable relief under the facts disclosed, if true.

Per Cur.—Judgment in favour of the demurrer—*Sherwood, J.*, dissenting.

BEARD V. ORR.

Quære.—Under what circumstances the court will allow the costs to a defendant under the provincial statute 48 Geo. III., c. 4.

This was a case argued last term, but as the court were divided it stood over till now for further consideration. *Ridout* obtained a rule *nisi* under the provincial act 48 Geo. III., c. 4, that the taxed costs of the defendant in this cause [should be allowed and set off against the sum recovered by the plaintiff. The facts were:—Defendant was arrested for £60. At *nisi prius* a verdict was taken for the plaintiff, by consent, for £50, subject to the award of arbitrators, to whom that verdict and all matters in difference between the parties was submitted, with power to call for books, papers, &c., on either side. Affidavits were put in on behalf of defendant, stating that plaintiff arrested him without probable cause, as plaintiff well knew that the said demand had been considerably reduced by the work and labour of the defendant and otherwise; that a day or two before the arrest defendant called on plaintiff for a settlement of accounts, urging as a reason that he was about to go to Cavan for a time. That Joshua Beard, plaintiff's son, in presence of plaintiff, said that it made no difference; that the accounts could not then be attended to, or words to that effect. That subsequent to the arrest he paid plaintiff £10, included in the above award, upon an understanding that the plaintiff should withdraw the action, pay costs, and settle amicably. That plaintiff, instead of so doing, declared that if but 1s. was coming to him he would make defendant pay costs. On the part of the plaintiff an affidavit was produced stating

that the defendant had not performed the agreement under which he claimed to set off, and that he (plaintiff) had been put to a considerable expense in getting others to finish what defendant had begun. Also that defendant would not produce a book, containing entries of their transactions, to the arbitrators when required by them. The award was for £37, 10s. 8d.

Draper shewed cause.—The courts have always laid great stress on the circumstance of parties going to arbitration, and when no verdict has been taken that circumstance has always been considered an answer to this application. Particular attention has also been paid to the fact (when such has been the case) of the power of examining the parties themselves, and of sending for books and papers.—1 B. & B. 278; 1 Moore, 92; 3 Moore, 590, 605; 3 B. & C. 494; 5 D. & R. 383. In this case *all matters in difference* were submitted besides the verdict. The court will presume that there were such other matters, or why was any mention of them introduced in the submission. In one of the cases cited it was said that the examination of the defendant gave him the opportunity of reducing the plaintiff's demand to a trifle; here he withheld the evidence of his books when those of the plaintiff were produced. *Non constat*, but those books would have reduced his set-off, or proved by acknowledgment a larger sum due. The cases in 5 B. & A. 513, and 1 B. & C. 91, will probably be cited on the other side. It is sufficient to reply to them that in each of those cases the plaintiff had expressly agreed to take a smaller sum than that for which he held the defendant to bail. In those cases, too, the defendant could

not have been held to bail for the sum which was actually recovered.

The *Attorney-General* and *Ridout, contra*.—The court will consider the introduction of the words “all matters in difference” into the submission as mere surplusage. It is not shewn that anything but what regarded the verdict was submitted or determined, and in the absence of such shewing the court will presume against it. The cases in 1 B. & C. 91; 2 Smith, 261; and 5 B. & A. 513, are in point. In the last case the court said that where there are mutual accounts the plaintiff should only arrest for the balance. Here he has arrested for the whole, and has recovered little more than half of what he held defendant to bail for. Surely this is without probable cause, and if so the defendant’s application should be granted.

The *Chief Justice* having been retained when at the bar gave no opinion.

SHERWOOD, J.—I think there are sufficient grounds for this application. It is decided that if a verdict be taken, subject to award, the sum awarded is to be considered as recovered in the action; and I do not think the wording of this particular submission alters the case. As to the want of probable cause, I think that is to be inferred fairly from the fact that the plaintiff held the defendant to bail for £60, and recovered little more than £30.

MACAULAY, J.—In this case the nature of the dealing between the parties, or of the testimony on either side, is not disclosed. It is urged on behalf of the plaintiff that it was a general reference of all

disputes. But it is not shewn that any subject matter was considered that might not have been discussed at *nisi prius*. The plaintiff's counsel also objects that this application cannot be entertained after a reference; but where there is a verdict I think it may, at least where the case only is referred. Nor do I see that the arrest being on the affidavit of plaintiff's agent can make any difference if unwarranted. The learned judge then went into an examination of the following cases:—2 Smith, 261; 1 Moore, 92; 1 B. & B. 278; 5 B. & A. 513. This appears the strongest case in favour of the defendant. It was obvious that the plaintiff there arrested for as much again as he pretended to be entitled to. He made no allowance for a previously admitted set-off. But in the case in judgment plaintiff says he credited all that was paid; that he knew not the extent of defendant's unliquidated claims, but intended to dispute the whole on the ground of breach of contract. 5 B. & A. 661; 10 Ea. 525; 13 Ea. 90; 2 N. R. 76; 1 Smith, 428; 1 Taunt. 60; 1 B. & C. 91; 1 Smith, 521; 2 Smith, 667; 1 B. & B. 66; 2 Marsh, 532; 2 D. & R. 266; 4 D. & R. 186; 6 Price, 126; 5 Price, 1; 2 Chit. Rep. 147; 7 D. & R. 369; 1 Marsh, 21; 5 D. & R. 383; 6 B. & C. 193—which last case is quite against the defendant's motion. Upon a full consideration of the cases and matters submitted on the present occasion I cannot consent to make the rule absolute, but think it should be discharged, though without costs, as not being made without probable cause.

The court being divided, *Ridout* took nothing by his motion. (a)

(a) See *McGregor v. Scott*, Tayl. U. C. Rep. 66; *Powell v. Gott*, 1 U. C. Q. B. 418; *McMicking v. Spencer*, Hil. Term. 6 Vic., per *McLean*, J.

ROBINET V. LEWIS.

In dower, the replication to a plea of *alien ne* need not lay any venue, as to the place of birth, within the allegiance, nor state of what parents or when the demandant was born. Such a replication is properly concluded to the country.

Alien ne may be pleaded in bar.

This was an action of dower. Plea in bar, *actio non*, because demandant is an alien born in foreign parts, and out of the allegiance of our lord the late king, and within the allegiance of a foreign State, to wit, the United States of America, and is not made a subject of our lord the king, by naturalization, denization, or otherwise, *est hoc par. est ver.* Replication—*precludi non*, because she is a natural born subject of our lord the king born in the allegiance of our late lord the then king; to wit, in the then province of Pennsylvania, and not an alien born in foreign parts, or within the allegiance of a foreign State, in manner and form as is in the plea alleged—conclusion to the country. Special demurrer—assigning for causes that the place of birth was not pleaded with an averment of time, nor of what parents, or with a proper venue, and that it should have been concluded with a verification. Joinder in demurrer.

The *Attorney-General* in support of demurrer.—This replication is pleaded in bar. Where alien enemy is pleaded in abatement, the conclusion is to the country, but when pleaded in bar it is concluded with a verification. This replication introduces fresh matter, and whenever that is the case a verification is the proper mode of concluding.—Fortes. 221; 1 Salk. 2; 4 Mod. 285–6. There is no venue laid in this province of the birth of the demandant. Every material fact should be laid (if necessary, under a *scilicet*) within the jurisdiction of

the court. No time is pleaded as to the birth of the demandant. The rules of pleading require every material fact to be pleaded, with proper averments of time and place.—Leach. Cr. Ca. 801.

Sullivan, contra.—This replication is rightly concluded. The affirmative is directly alleged in the plea; the replication distinctly denies that allegation; where there is an affirmative and a negative there is an issue to go to the country, and therefore this conclusion is proper.—1 Saund. 102, and notes; 2 Burr. 1022; 1 Taunt. 224; 2 T. R. 439; 7 B. & C. 809; 7 Taunt. 30. This replication is according to the best rules of pleading, and its conclusion has a tendency to prevent unnecessary prolixity on the record. As to place, a formal venue is not necessary in a plea in bar, or in a replication, all things referring to the place laid in the declaration.—Saund. on Pleading, 778. There is no new fact in the replication, it is only a denial of the plea.—2 H. Bl. 161; 10 Ea. 359.

The *Attorney-General*, in reply.—New facts are stated in the replication; these are, that demandant is a natural born subject, and was born in the province of Pennsylvania; neither one nor the other is averred in the declaration or plea; they appear on the record for the first time in the replication. It is a clear rule that the proof of the issue lies on the party last affirming, and the demandant must prove her being a subject. The tenant is by the conclusion prevented from a rejoinder, though two or three might be framed. This case in 4 Mod. 285, is in point. The time of the birth too should have

been alleged, in order to shew that it was previous to the peace of 1783, when Pennsylvania was a British province.

This argument took place last term, and the opinion of the court was this day pronounced by the

CHIEF JUSTICE.—The case is now before the court on this demurrer, and stands for our judgment upon the pleadings only as they are spread upon the record. Though not absolutely without precedent in this court, the action is still novel with us, but our judgment is not called for upon any other point than the sufficiency of the pleadings.

With respect to the first cause of demurrer assigned, namely, the want of laying some place within the allegiance of the king, by way of venue, where the demandant is supposed to have been born, it is, in our opinion, not sustainable. If the objection be urged with reference to a supposed necessity of assigning in the replication a place within the jurisdiction of the court as a venue, in order to the trial of the issue, it is clearly unimportant on that ground. The original intention of the law was, that whenever an issue of fact was joined, the jury who were to determine it come from the hundred or parish where the disputed fact is alleged to have taken place; but this advantage in the investigation of truth, if indeed it was an advantage, was dispensed with when the statute was passed, which directs the jury to be taken, not from the *visne*, but from the body of the county in which the venue is laid in the declaration.

The effect of this change in dispensing with the necessity of assigning a venue in the replication is most clearly stated in the case of *Ilderton v. Ilderton*, 2 H. B. 161, which also was an action of dower. The decision in that case has ever since been taken to establish it as a principle that a statement of venue in a replication is wholly immaterial, because since the statute of Anne the venue in the declaration necessarily draws after it the venue in the subsequent pleadings; and therefore to assign in the subsequent pleadings any other venue would evidently be nugatory, and to assign the same would be useless, since the statute sufficiently provides for it. If the objection be urged, not with reference to the statement of the venue for the purpose of trial, but upon the ground that some place within the allegiance of the king must be stated as the place of the demandant's birth, then we are still of opinion that the averment in the replication is sufficient. It is agreeable to the principles of pleading, and to the forms of replication, in all cases like the present, that a place of birth should be averred; but it is clear that the particular place is not traversable; the party pleading is not confined to it in evidence, but may prove his birth in any other part of the king's dominions.

It is expressly laid down that if one "born in Jersey, or elsewhere within the king's obedience, brings a real action, and the tenant pleads that the demandant is an alien, born under the obedience of the French king, and out of the allegiance, &c., the demandant may reply that he was born at such a place in England, within the king's allegiance, and

such hath ever been the manner of pleading in such case.”—Bac. Abr. Alien., E. Here the demandant has named a place, alleging it to be, or rather have been, at her birth, a province of the late king, and within his allegiance. At the trial, where it becomes necessary for her to prove her allegiance, it lies upon her to shew that she was in fact born at some place within the king’s allegiance, and it is immaterial at what place, whether in New Brunswick, in Pennsylvania, when it was a British colony (as certainly it once was), or in London.

We think there is nothing in the second cause of demurrer assigned, and indeed it did not seem to be insisted on. It has been determined that in a plea imputing alienage, in which everything must be stated that is necessary to negative the plaintiff’s right, the additional statement, *et de parte et de matre*, &c., is not necessary after the averment of the plaintiff’s birth, *extra ligeantiam*. A question might be raised whether the statutes passed subsequently to the decision referred to, and which preserve to the children and grandchildren of British subjects born abroad the character of British subjects have not imposed the necessity of such an averment *mutatis mutandis*, in the plea of alienage, as it is contended ought to have been inserted in this replication; but upon principle and precedent it is clear that no objection on this point lies to the replication.

The third cause of demurrer is, that the time of the birth is not alleged; but no authority applies to shew that this is necessary; neither do the precedents require it. In argument this objection was

urged upon the ground that in this case it was necessary that time should have been stated in order that it might appear whether the demandant was born during the period that Pennsylvania belonged to the Crown; but, for reasons already given, we do not think that argument applies.

The last cause of demurrer assigned is that the replication is ill concluded to the country, and authorities were cited which without examination would appear to support that objection, particularly the cases in 1 Salk. 2 & 4 Mod. 285. These cases, and others of an earlier as well as of a later date, maintain a distinction where *alien ne* is pleaded in abatement or in bar, deciding that in the former case the plea may conclude to the country, but that in the latter it cannot but must conclude with a verification. The reason given for the distinction shews, however, very clearly that the distinction itself now no longer prevails. It was held clearly not necessary to conclude with a verification when the matter of *alien ne* was pleaded in abatement, because, as it was said, it shall be tried where the action is brought. But since the statute of Anne it shall equally be tried where the action is brought, if pleaded in bar, and therefore the reason for the difference fails.

The case of Ilderton v. Ilderton, before referred to, and Sergeant Williams' note in 1 Saund. 8, and the case in 7 T. R. 234, are conclusive upon this point. All those authorities, indeed, which seem at first sight to support this objection, are directly in point against it when they come to be applied to

pleadings in the present day. The case in 2 T. R. 439, and that in 3 T. R. 426, are also material to shew that upon general principles it cannot be contended that there is in this replication such an introduction of new matter as to prevent the demandant from concluding to the country. We are therefore of opinion that judgment must be given for the demandant on this demurrer.

If any of the objections to the replication had appeared to us to be sustained, we should have found it necessary, before we gave judgment for the tenant, to come to a satisfactory conclusion upon a question which arises upon the plea, and upon which we have found the authorities very conflicting. The plea of *alien ne* in all the cases referred to (except when alien-enemy is expressly pleaded) are in abatement and not in bar; and Lord *Coke*, and many other authorities, lay it down broadly (without any distinction as to real actions, where certainly the objection goes to the right) that *alien-amy* must always be pleaded in abatement. Upon principle, however (although in this case the authorities are not so express or so consistent as we might expect to find them), we are at present inclined to consider that in this action the plea in bar is sufficient.

Per Curiam.—Judgment for demandant.

THE KING V. JACKSON ET AL.

The lease of a Crown reserve having expired, the court refused a writ of restitution after a conviction of forcible entry and detainer.

The defendants were indicted for a forcible entry

and detainer. The indictment contained two counts : one at common law, the other under the statute,—prosecutor alleging he had a term of years in the land. The indictment had been removed by *certiorari* from the quarter session in the Home District. At the trial the prosecutor proved a forcible entry and detainer on lot No. 8, in the township of Etobicoke, and with a view to entitle himself to restitution gave in evidence a lease from one Meighan to him of lot No. 7 in the same township, contending that this in fact was meant to be a lease of the lot on which the forcible entry was made. The defendants put in evidence a lease from the Crown to them of both lots 7 and 8 for a term expiring the 25th December 1829. There was a general verdict of guilty, and sentence was passed last term on the defendants, when *Baldwin* moved for a writ of restitution and obtained a rule *nisi* returnable this term.

Small and *Draper* shewed cause. — There are many instances in which, although the defendant may have been convicted of forcible entry and detainer, still the prosecutor is not entitled to restitution. Such is the case of a disseisee who enters with force and ousts his disseisor; restitution shall not be awarded, for the disseisee's title is revested by his entry, and he is in by operation of law. At common law restitution could not be awarded, and it was given by statute to save the party injured from being driven to his action. But the party must shew such a title as would entitle him to recover in ejectment. It must appear in the indictment, and be supported by evidence, to warrant a restitution. Now, in the first place, the only evi-

dence offered which supports the count for a term of years is of a lot different from that on which the tortious entry was proved. Before a writ of restitution can issue, not only a title to the lot but a forcible dispossession of the same lot must be shewn. Here the title is to one lot, the force to another. Besides, the title, let it be to which lot it would, is at an end; for by the patent before the court it appears that the term of years granted by the Crown in those lands expired the 25th December 1829. Restitution could only be awarded of the term, and the court see that is expired, and the title of the premises is now in the Crown.

Baldwin, contra, contended that as defendants were convicted on both counts, it was conclusively found that they entered forcibly on land in which the prosecutor was interested for a term of years. A party may convey his land by any name he pleases to give it, and it appeared at the trial that the land on which the forcible entry was made was the same which Meighan had been in possession of and had leased; and the difference of the number of the lot should not weigh with the court, as the party must take possession, at his peril, of no more than he is entitled to. As to the title being in the Crown, it is an additional reason why restitution should be granted; for the prosecutor cannot maintain an ejectment, nor can he get a renewal of the lease, while he is out of possession, which he has no other means of obtaining, and which as against the wrongdoer he is surely entitled to.

Sed per Curiam.—Writ of restitution refused.

LINLEY V. CHEESEMAN.

Court will not grant leave to enter an *exoneretur*, when bail have surrendered their principal, without a certificate from the sheriff.

This was a motion for leave to enter an *exoneretur* on the bail-piece, the defendant having been surrendered into custody. But this was only proved by the gaoler's receipt, and by an affidavit of the fact, and that the sheriff was not in the district at the time of the surrender, and that his deputy was absent from the county town on the business of his office at the same time.

Sed per Curiam.—The statute is peremptory. If you wish to avail yourself of a surrender thus made, to discharge the bail, you must comply with the terms of the act and obtain the sheriff's certificate.

HYDE V. BARNHART.

Payment of the weekly allowance to a person acting as turnkey is good.

Motion to discharge the defendant, an insolvent debtor in execution, from custody for non-payment of the weekly allowance. To support the application an affidavit from the defendant stating that it had not been paid on the 21st of December last, and one from the gaoler stating that he had not received it for the defendant, were produced.

To answer these an affidavit of one Trickey was read, who swore he went to the gaol on the day in question for the purpose of paying the weekly allowance—that the door was opened by a person named

Wilson, who had the keys, and who stated that defendant was in prison, and had requested him (Wilson) to receive his allowance. The affidavit also stated that Wilson appeared to be acting in the capacity of gaoler, having the keys in his possession and letting people in and out, and that Trickey paid the money to Wilson for defendant's use. The question was, whether this payment was good under the provincial statute.

SHERWOOD, J., thought this payment good, and that this case was similar to that reported in 1 N. Rep. 111.

The CHIEF JUSTICE and MACAULAY, J., having been retained in the cause, gave no opinion.

Motion refused.

Draper for plaintiff, *Washburn* for defendant.

Leave was afterwards asked by *Heward* for the plaintiff to file fresh interrogatories, and in the meantime to suspend payment of the weekly allowance, upon an affidavit that further instructions had been received by the plaintiff's attorney respecting property supposed to have been made away with by the defendant, and which the attorney had no knowledge of when he filed the first interrogatories. But, upon consideration,

SHERWOOD, J., refused the application.

IN RE THE BANK OF UPPER CANADA V. ROBERT
BALDWIN.

A stockholder, merely as such, has no right to inspect the stock or other books of the bank ; nor will the court grant a *mandamus* for that purpose although they have the power, unless some special ground be disclosed sufficient to warrant it.

Baldwin obtained a rule last term for a rule *nisi* for a *mandamus* to the President, Directors, and Company of the Bank of Upper Canada, to permit him to inspect the stock book, in which are entered the names and numbers of shares of stockholders, and to take copies thereof, or of any part thereof—grounded, first, on an affidavit that such a book is kept ; second, on an affidavit of having made such a demand, which was refused, and that *Baldwin* is possessed of twenty shares of capital stock. No special object for the inspection was alleged or urged. The court desired the matter might lie over till this term, and now judgment was given as follows:

[The CHIEF JUSTICE giving no opinion.]

SHERWOOD, J.—I think this court has the power of granting a *mandamus* in this case ; but I am of opinion that no sufficient cause has been shewn to justify its interference. Nothing has been adduced to prove that any failure of justice has or will occur in case the writ does not issue ; or that any object would probably be obtained if it should issue. Mr. *Baldwin* grounds his motion on his right as stockholder only. I am not aware of any decided case which at all supports his application, and on general principles I think it cannot be sustained.

MACAULAY, J.—(After stating the case.)—Without going into the question of right, it does not on the

present occasion appear that Mr. *Baldwin*, when he made the alleged application, was a stockholder at all, or in any ways interested or concerned in the affairs or business of the bank. But assuming that he was—is he entitled to call upon this court *ex debito justitiæ* to grant to him, as a matter of right, an order to inspect, and if desired, to copy, the stock book, or any part thereof, because he owns twenty shares of stock, which the statute shows would entitle him to vote for, and also qualify him to be elected a director, being a subject resident in this province? By the provincial statute passed 21st of April 1821, sec. 1, the Bank is incorporated; the management by a president and directors; their qualifications, time and mode of election, are stated in sec. 8; sec. 10 entitles stockholders to vote; sec. 11 provides for declaring dividends, &c.; sec. 12 gives directors the power of making rules for the management of the stock, &c., *and all such other matters as appertain to the business of a bank*, not repugnant to the laws of this province. By sec. 11 transfer books are to be kept. Two questions include the whole matter in judgment:—1st, whether a *mandamus* can be granted at all in the present instance—2nd, If so, whether, on the matter shewn, it ought to issue.

In answering these questions it is necessary to examine into the nature of proceeding by *mandamus* as respects corporations.

A *mandamus* is a writ commanding the execution of an act where otherwise justice would be obstructed or the king's charter neglected, issuing regularly only in cases relating to the government and the

public, and is termed a prerogative writ, grantable only where the public justice of the nation is concerned.—Bac. abr. *Mandamus*. It is to be issued when the law has established no specific remedy, and where in justice there ought to be one.—1 Bl. 352, 552; Cowp. 377. It lies not as a private remedy excepting on the statute of Anne, Com. dig. Mand. A. B. Bull. N. P. 199. The motion for a *mandamus* to inspect is entertained only where an action is pending.—Barns, 236; 3 Wils. 398; 5 Mod. 385. These cases are, however, shaken by the following:—1 T. R. 689; 3 T. R. 303; but the same doctrine is established in 8 T. R. 590; and it is decided to be by no means a matter of course to grant a *mandamus*.—Str. 646, 717, 1005, 1203. When granted it is confined to an inspection of matters relative to the point in issue.—Str. 1223, 1242; 3 T. R. 579; 7 T. R. 746; 10 Ea. 235; 4 M. & S. 162; 2 Chit. Rep. 288. The right of inspecting public documents is well treated in 1 Phill. Ev. 405. If we refer to the cases, and circumstances attending them, no one in point will be found, and in applying the principles they establish it is open too much to question whether the present application is at all sustainable. Mr. Nolan, the editor of Strange's Reports (2 Str. 1223), says he can find no instance of a *mandamus* to inspect books of this kind, and that it did not seem settled how far any corporators could apply for a general inspection, &c. I believe no case can be found down to the present period. On the contrary, the authorities would rather seem to restrict than extend the privilege desired. A distinction prevails between public corporations having the government of towns, &c.,

or constituted for purely public purposes, and trading companies, such as banks, &c.—5 B. & A. 399; 2 B. & A. 620. The case last cited would seem to deny the right of *mandamus* altogether. The facts of that case were far stronger than the present. The applicant had an interest at stake, and was actually seeking a private benefit—his share of profit. Here nothing is sought, but the right claimed without any definite object. When parties are litigating claims, the power of the court to interfere is quite a different question, and for obvious reasons. The constitution of the bank is contained in the act of incorporation already mentioned. The directors are the representatives of the whole body. They are required to declare half-yearly dividends, but, it seems, cannot be compelled to do so by *mandamus*. They are required to keep stock books; but where is it found that they can be compelled to shew them to any or all of the stockholders at any or all times? They are to make rules touching the stock, property, effects, officers, clerks, servants, and all other such matters as appertain to the business of a bank. Now, had they made a rule that the stock book should not be open to inspection except at the time of election, would it be held to be an unreasonable or illegal by-law? I am not prepared to say it would. To many purposes the corporation is a partnership. A great object in a corporate charter is that individual partners are not personally responsible; but if an act of parliament authorised a trading company of a thousand members, liable to all the usual partnership responsibilities, I do not see that a member of that company might not as well apply for redress by *mandamus*, if aggrieved or abridged in his right, as

in the present instance. I cannot admit that it is because a public body is a body corporate that the courts assume the right to interfere, but because of their public character. Now, as between the stockholders individually and the directors, I question whether the bank is to be regarded as more than a private trading company. The interests of the whole are intrusted to directors of their choice, and those who wish to become interested in the corporation must do so relying upon their management, and that alone, unless where private rights are litigated in courts of law, when, for the ends of justice in judicial proceedings, the courts may interfere so far as the particular case may require. The directors represent the whole, and they have access to all books, &c., and the control of all matters. If a majority of the directors refused access to the minority, and the latter sought the aid of the court it would be a much stronger appeal. It is not necessary at present to say whether a case might not arise that would justify the interference of the court by *mandamus* as between the stockholders and board of directors; but I by no means find authority that it would. It is not now incumbent on the court to decide this, for however a case might arise calling for the high prerogative writ, I am quite satisfied it ought not to issue upon the present application.

Per Curiam.—Rule *nisi* refused.

WINCHESTER v. CORNELL.

This was an action of covenant. The defendant had leased certain premises to the plaintiff, and contracted to give possession on a certain day subsequent to the date of the agreement. The breach was the non-delivery of a part of the premises leased. Plea, *non est factum*. At the trial at the last assizes for the District of Niagara the subscribing witness was called to prove the execution of the agreement. The defendant was illiterate, and could not write. The witness could not positively state that he saw the defendant make his mark or deliver the deed; but to the best of his knowledge and belief he saw both. Two witnesses, daughters of the defendant, were called on his side, who swore they were present at the same time, and did not see the defendant execute the agreement. The Chief Justice, who tried the cause, charged the jury "that it was proved the plaintiff entered into part of the demised premises under agreement." The jury found for the plaintiff, and last term a new trial was moved for principally relying on the ground that there was no evidence of the execution of the agreement. On reading his notes,

The CHIEF JUSTICE remarked that he did not find the fact, which he had stated to the jury as having been proved, with regard to the plaintiff's taking possession, in his minutes of the evidence, and time was given till this term for the plaintiff to file affidavits stating that such evidence had been given. And now two affidavits were produced both swearing to the fact itself, but neither stating it had been

proved on the trial. Under these circumstances the Chief Justice, being satisfied that a new trial would not alter the event, was of opinion that the rule *nisi* should be discharged.

SHERWOOD, J., differed—thinking that when any reasonable doubt existed as to the verdict being the same, in case the fact had not been proved as stated, a new trial should be granted. Cited 4 T. R. 753; 4 M. & S. 532.

MACAULAY, J., having been concerned in the cause when at the bar gave no opinion.

The court being divided, the defendant took nothing by his motion.

FERRIE V. RYKMAN.

In an action on a promissory note the declaration must aver presentment for payment at the place where it is made payable.

ASSUMPSIT brought to recover the amount of a promissory note drawn by the defendant in favour of the plaintiff, and payable at the Bank of Montreal. The declaration was in the common form, and the defendant demurred, specially assigning for cause the want of an averment that the note was presented for payment at the particular place where it was made payable.

Ridout, in support of the demurrer, urged that however the decisions might have been contradictory at one time, the later cases clearly recognised the

principle of this demurrer as good law ; and although in 2 Camp. Lord *Ellenborough* denies the necessity of such an averment, yet that opinion is overruled in 3 Camp. 247. He contended that the case of *Rowe v. Young*, 2 B. & B., applied in principle to this, and was decisive. He also cited 2 Taunt. 61 ; 5 Taunt. 32.

The *Solicitor-General*, *contra*.—This case is clearly distinguishable from that of *Rowe v. Young*. That was an action against the acceptor, who had accepted, payable at a particular place. He had a right to narrow his undertaking, and it is in the option of the holder to accept or refuse this qualified acceptance. But this action is by the payee against the drawer of a promissory note ; he surely is everywhere liable. The introduction of the words “on demand” into a promissory note does not make a demand a necessary preliminary to bringing an action. The bringing a suit is, according to express decision, a sufficient demand. So here the introduction of a particular place is only a notice that the party will be prepared at that place, but ought not to narrow his liability, which is general.

The CHIEF JUSTICE.—In consequence of the decision of the House of Lords in the case of *Rowe v. Young* an Act of Parliament was passed with reference to acceptances payable at a particular place ; but I am satisfied that act does not and was not intended to apply to promissory notes. Then as to them the decisions are certainly contradictory ; but I think the weight of authorities is in favour of such an averment, and that on the trial it must be proved.

SHERWOOD, J., concurred.

MACAULAY, J., having been concerned in the cause gave no opinion.

Per Curiam.—Judgment for defendant.

JOHNSON V. DURAND.

Small moved to revive a rule *nisi* which had been obtained in this cause last term, and which had lapsed on affidavits stating that the rule which had to be served in the Gore District has been duly served and sent to York, but was by some accident mislaid, and did not reach until after term. He argued it on the ground that he was too late to obtain a new rule, and that if this motion were refused the party would be without remedy.

The court under the circumstances granted the motion.

HALE ET AL. V. MATTHESON.

A mis-recital in a submission will not vitiate an award.

The *Solicitor-General* last term obtained a rule *nisi* to set aside the nonsuit granted in this cause. The action was brought on an award, with the common counts. The submission recited in the declaration was between the plaintiff in that suit and three defendants, but in the award the name of one of the defendants was omitted. For this variance *Sherwood, J.*, nonsuited the plaintiff.

Jonas Jones now shewed cause. The declaration states an award between the plaintiff and three defendants, and to support this they give in evidence an award between the plaintiff and one defendant. This is a fatal variance; it is not the instrument declared on, and consequently the nonsuit is right.

The *Solicitor-General, contra*.—In the award a distinct reference is made to the identical submission; it is made on the authority given by that submission, and is made in the same suit, and refers also to the rule annexed, which is a rule in that same action. The recital of the names was wholly unnecessary. The true question is, was there not an award made such as described in the declaration, and grounded on that very submission. Besides, the omission of the name of one defendant is not in the body of the award itself; it is in the recital of the submission, and the reference to the rule annexed shews clearly that the award was made in that suit. A mis-recital will not vitiate.—1 B. & B. 350. A submission mis-recited was judged immaterial in an action on a bond.—1 B. & P. 40. In an action on a promissory note the plaintiff's name was Edward, the note was given to Edmond; this variance was decided to be of no consequence.—16 Ea. 110.

The CHIEF JUSTICE.—Two grounds of nonsuit were taken at the trial. 1st. That the arbitrators had not sufficient authority. 2nd. That there was a variance. The first ground was very properly overruled at the trial, for the fifth count in the declaration sets out an award made by the arbitrator on a submission by the parties to him. As to the second

submission, did the arbitrator make his award between the parties to the suit or between other parties? Looking at the papers as attached together, I cannot say but that the award is made between the identical parties. The annexed rule is expressly referred to, and that rule is in the cause referred. The mis-recital of the submission cannot in my opinion vitiate the award, and the variance is therefore, as I view it, insufficient to warrant the nonsuit.

SHERWOOD, J., concurred.

Rule absolute.

BAKER v. BOOTH.

Where acts are concurrent an averment on plaintiff's part of performance or readiness to perform the act to be done by him is indispensable.

DEBT.—The declaration contained two counts, one on a submission, the other on the award. The case was brought before the court last term on a demurrer to the replications to the 2nd, 3rd, 8th and 15th pleas, but was ultimately decided on the declaration only. It is therefore unnecessary to state the other questions, as the court did not decide them. It was argued last term by *Bidwell* for the plaintiff, and *Bethune* for the defendant, and in this term by

The *Solicitor-General* for the plaintiff, and the *Attorney-General* for the defendant.

For the plaintiff it was urged, after stating the award, as follows:—That the defendant should pay

to the plaintiff £149 on the 5th January then next, and that plaintiff should deliver up to defendant a dwelling-house, then in his occupation, on the 5th January then next, in as good repair as it was at the time of the making the award. That the plaintiff should have liberty to harvest a crop then growing on the land. That all suits should cease, and mutual releases be executed. That the objection raised to the declaration is the want of an averment of the plaintiff's readiness to deliver up the house to the defendant, it being insisted that the delivering of the house is a concurrent act with the payment of the £149 awarded—to recover which this action is brought—and that therefore such an averment is necessary. These two acts are not necessarily concurrent, neither are they made so by the express terms of the award; it depends entirely on the will of the parties whether they should be done at the same time, or whether one should precede the other. The way in which the day is fixed by the arbitrators for the performance of these two acts shews that they did not intend them to be dependent one upon the other. They do not say the defendant shall on a given day pay £149, and at the same time or on the same day the plaintiff shall give up possession; on the contrary, they give a specific date for the performance of one independent act by the defendant, and a specific date (not referring to the one already given) for the performance of another independent act by the plaintiff. The manner in which this is done is equivalent to laying two distinct days. The acts therefore are not necessarily concurrent; but if concurrent, it is only necessary to aver performance where the one concurrent

act is the consideration of the other.—1 Saund. 320, n. 4. Now, neither act in this case depends in the slightest degree on the other; each stands alone, to be performed at all events, not as the consideration by which performance is to be obtained from the other side. They are like independent covenants, and in principle this is similar to an action of covenant. But supposing this to be a consideration, by examining the award we find that if it is to be thus viewed, there are also other acts which are, with equal reason, to be taken in the same light; the plaintiff is to have liberty to harvest his crop, actions are to cease, releases to be executed. The delivery of the house, if a consideration at all, is only a part consideration, and then such an averment is not necessary.

For the defendant it was argued that this is similar to an action on a covenant between the parties, and the established rule of law is, that where any two acts are to be performed, one by each party, they are necessarily concurrent acts. The award is the agreement of the parties, declared and carried into effect by the arbitrators. That such an averment is necessary appears clearly by the reasoning in 2 Saund. 351, and the cases there cited; as to there being other considerations, they do not appear in that part of the award which the plaintiff has thought fit to set forth in his declaration. In the replication the plaintiff has set forth the whole award, but the declaration must stand or fall on its own merits—the subsequent pleadings cannot be called in to its aid.

The CHIEF JUSTICE.—The court think this declaration cannot be supported; on a demurrer nothing can be intended; after a verdict no notice could be taken of the facts thereby found. The facts pleaded, and the manner in which they are pleaded, are what we must determine. The declaration contains two counts, one on the submission, the other on the award. The pleading is not sustainable. In debt, on a submission bond, the whole award must be set out, either in the declaration or replication; here he has only set out part, not the whole, and this is a fatal objection. When the whole award is set out it appears that neither count can be supported. There is no averment that the concurrent act was performed, or that the plaintiff was ready to perform his part. We entertain no doubt but that these are concurrent acts, and that such an averment is strictly necessary.—4 T. R. 762; 8 T. R. 366; 1 Ea. 203; 7 T. R. 125; 1 Saund. 320, note c.; Doug. 691; 1 Salk. 112, 171, all bear on the question. For want of this averment we think the defendant entitled to judgment, and the declaration being bad it is not necessary to decide upon the objections to the subsequent pleading.

Per Curiam.—Judgment for the defendant.

PHILLIPS V. REDPATH AND M'KAY.

In trespass, if the defendant rest his defence on acting under the Rideau Canal Act, he should be prepared to prove that the act which is complained of was regularly done under that statute, and not rest his defence on the circumstance that he was employed in the construction of the canal.

TRESPASS *qu. claus. freg.* and a count *de bonis*

asportatis. Pleá, not guilty. The cause was tried before *Sherwood*, J., at the last assizes for the Johnstown District, when the following facts appeared in evidence:—that the plaintiff had authority from *Charles Jones*, Esq., the owner of the *locus in quo*, to erect a frame building there; that the agents of the defendants wrote to plaintiff forbidding him to erect a frame at the place proposed, on the ground that the land in question was required for the Rideau Canal; that one of the defendants interfered to prevent its erection on any part of that land; that the frame was torn by the defendants' servants; that defendant *Redpath* used insulting expressions respecting the plaintiff, stating also that he wanted the place for a friend of his to keep a store on; that the frame was drawn away and destroyed by *Redpath*; and that the land in question had never been used in any way for the canal. No justification was attempted. The learned judge left it to the jury to find for plaintiff, and to measure damages according to their opinion of the defendants' motives. If they thought the defendants were actuated by a view to the public service, or even inadvertently, not to enlarge upon the damage actually sustained; but if their conduct, under the evidence, was not entitled to such favourable consideration, to exercise their discretion. The jury found for the plaintiff, £100. The *Attorney-General* had obtained a rule *nisi* for a new trial last term.—1st. Because a sufficient justification under the Rideau Canal Act was in proof, in consequence of the letter produced to that effect. 2nd. For excessive damages; and this term

Jonas Jones shewed cause.—The actual damages sustained by the party does not constitute the sole question in a case of this sort. The current of authorities proves the contrary, and that other considerations are properly left to the jury to influence their verdict.—Burr. 609. The jury are to exercise a proper discretion as to the damages. The matter was here left to the jury, not only as to actual but as to probable or even possible damage. They were to consider what had been the conduct of the defendants; and taking all into consideration, these damages are not outrageous. In the case in 2 Wils. 160, imprisonment for a few hours—damages £300, and a new trial refused. In 2 Wils. 206, it is said, “it is dangerous to meddle with the damages in actions for torts.” The learned counsel cited also 2 Wils. 252, 405; 6 Ea. 256; 5 Taunt. 281; 4 T. R. 654; 3 Wils. 62; 2 Bl. Rep. 929, 942; Cowp. 230; 1 Marsh. 139, as establishing the principle that there was no ground to interfere on account of the damages.

The *Attorney-General*, *contra*. — There was no evidence to shew that the plaintiff sustained damages beyond the mere value of the frame. The cases cited result from the personal injury and affront; it was not a question of injury to property, which arose in them. In those cases there was no criterion as in a case like the present; nothing whereby to measure the damages. This is an action for an *asportavit*. Trover might have been brought equally well, for taking scantling and boards, the value of which is the true estimate of the damages. The

land in question was in possession of the defendants, who cleared it. (This was shewn by one of the affidavits.) No evidence was given that plaintiff meant to set up a tavern as was pretended. The proof was confined to the putting up and pulling down a frame, and an idle expression uttered in heat. They do not nor could they prove that the intent of defendants was to favour some other person; it was merely an empty assertion of Redpath, a subordinate agent to the other defendant. There is no ground to allow the plaintiff damages for the loss of tavern keeping where *non constat* that he would get a license.

The CHIEF JUSTICE.—This is a case of considerable importance from the nature of the defence; not properly the defence made out by evidence at the trial, for the defendants called no witnesses, but the defence which has been adduced in the affidavits produced on the argument for a new trial. This defence has been grounded on the act of this province commonly called the Rideau Canal Act, which confers on the persons employed in constructing the Rideau Canal certain powers and privileges. Under these powers and privileges the defendants claim to be protected against this verdict, and it is equally necessary for the public service, and for the peace and interests of individuals that any legal questions likely to arise upon the extent and application of the act alluded to should be speedily and clearly settled.

The Rideau Canal is a public work of great importance to the province in several points of view,

and that its accomplishment will confer immense advantages upon this country there can be no doubt. Like other great and general benefits, however, it cannot be attained but with some partial sacrifices—and of necessity private interests and convenience must for the sake of such objects be made to yield to the public welfare. It is so in all countries. It is the duty of the legislature, however, and without doubt it is their wish, to make such provisions upon these occasions as will secure to private rights all the protection that is consistent with the end in view.

The statute now in question confers large and liberal powers, such as manifest on the part of the legislature the greatest confidence in the judgment and discretion of the public officers and agents to be employed. It may be that the powers given by the act now under consideration are unusually extensive; but I believe, upon a comparison of its provisions with those of acts passed for similar purposes, and even for less important purposes, both in these colonies and in Great Britain, it will be found that they are in no respect unprecedented.

It is evident that the legislature when they create such powers to be used only for the public good, act upon the double assurance that there will be no disposition to abuse them, and that even if such a disposition should discover itself there is inherent in the constitution a power to correct it. The language of the Rideau Canal Act is so comprehensive as to afford great latitude to the court in applying the ample protection it gives, according to the truth of

the case. I say according to the truth of the case, for if indeed a mere pretence should be advanced, it ought not to be suffered to succeed, and the law will take care that it shall not. In this case the plaintiff complains that the defendants committed a trespass on his close, and pulled down and destroyed the frame of a house that he had erected. He proves the acts that he complains of to have been committed, and defendants produce no witnesses; but it appears from the testimony brought forward on the other side that they are contractors on the Rideau Canal, and if any question can arise as to their right to protection in that character, I have no hesitation in considering that whatever power is given to the Military Superintendent employed in constructing the work is equally extended to them as his servants or agents, and that whatever he could justify as necessary for the service he is engaged in, they could equally justify, if done under his discretion and with his sanction. It would make no difference, in my opinion, whether they were labouring under the superintendent in a military department or upon a contract. They are protected when they shew that the act complained of was done under the authority contemplated by the statute, and was necessary for some of the purposes to which its provisions extend. But here, in my judgment, the defendants have failed to prove anything that might establish such a defence. It is true that since the trial, and upon the motion before us for setting aside the verdict, the defendants have read an affidavit of an engineer upon the necessity of the act committed by the defendants; but we cannot try the cause here, nor can we properly direct a new trial, in order that it

may be decided upon this new evidence. In evidence of that nature the defence, if any could be urged, entirely consisted. None such was offered at the trial. There is no allegation of surprise, nor any reason given why the defendants were not prepared to justify their act before the jury. In all other cases the rule is that a new trial shall not be granted in order to enable a party to give fresh evidence which he ought to have given upon the first trial. If it were otherwise there would be no end to litigation. The exceptions to this rule are so few and under such circumstances that they tend strongly to establish the rule. Law is administered upon general principles, and if without some satisfactory reason we should forbear to apply a well-known rule here which is applied in other cases we should act arbitrarily and against authority. The only reason suggested is that the case affects the public officers; but I cannot, in the absence of all necessary proof, attach importance to that circumstance. In common cases between party and party ignorance or poverty may sometimes really have occasioned a defendant to omit evidence necessary to his defence; but the very allegation that here the defendants' acts were done under higher authority than their own implies that there was no such want of intelligence or means as might sometimes be pleaded, though not effectually, by other defendants. Why the defendants did not take the necessary measures for bringing their defence properly before the jury does not appear; but it may be gathered from the argument at the bar that they relied upon the act for protecting them. But to have the benefit of that protection they should have shewn if they could that their conduct was

such as the act justifies; they should have proved themselves within it; *prima facie*, their act was a trespass. It was a forcible interference with another's right, and the proof of every fact necessary to justify such an interference was incumbent upon them. There are numerous statutes which protect individuals in the discharge of public duties. They all proceed upon the same principle, and with respect to all of them the party claiming protection in a suit at law must make out his case and not leave it to be conjectured by the jury. He cannot content himself with merely proving that he was a public officer, and call upon the jury to presume that all he did was legal. It may without consideration appear a hardship to the officers employed on the Rideau Canal that they are exposed to be harassed with actions at law and put to great trouble in vindicating acts which the law has authorised for the public good; but this is unavoidable, because, on the other hand, private rights must be protected; and this can only be done by providing that when an injury is complained of there shall be a complete investigation. Magistrates, for instance, are acting gratuitously in the discharge of duties very important to the public and in no way beneficial but often disagreeable to themselves; still they are liable to be harassed with actions, in which they must defend themselves by proving their acts to be legal. It is so also with path-masters, sheriffs, custom-house officers, and many others. It is not their public character alone, but their conduct in that character, which constitutes their protection, and that conduct therefore must be shewn by them to be legal whenever it is brought into question in a court of law.

In this case the only particle of evidence that could make for the defendants came out by an admission of the plaintiff that a clerk of the defendants had written a letter declaring to the plaintiff that he would not be allowed to place his house where he afterwards did place it, the ground being required for the canal.

It is impossible to contend that this is any evidence ; because if the mere assertion of a clerk of a contractor that a piece of ground was necessary is to be considered conclusive proof that it was so, without his being held to declare afterward on oath on what authority or with what degree of justice and reason he said so, then every proprietor of land in the vicinity, or indeed in that district, would hold his land and house at the mercy of the discretion and honesty of a contractor's clerk.

In my opinion an assertion of the superintendent himself would be equally inconclusive if he cannot afterwards shew that in making such a declaration he acted *bona fide* and within the fair scope of his duty. If he really did want for the purpose of the canal the land on which the frame was erected, the act points out how he is to proceed ; and if his taking it should be afterwards complained of, he must be prepared to shew on what ground and for what purpose he took it. A custom-house officer has power by act of parliament, when he suspects unlawful goods are concealed in a house, to take a peace officer in the daytime and search for them ; but if under this authority he should enter the house of a most respectable person, a magistrate for instance,

or a clergyman, and pretend to search when in fact there was no cause, it would not serve his purpose to shew in his defence upon an action that before he went in he had asserted that he did suspect unlawful goods were concealed there; he must shew some reason for his suspicion, or a jury will not believe that he entertained it; they will regard him not as acting under the statute, but as acting oppressively under colour of the statute, and they will give damages against him accordingly. But then it is said that the statute, makes it sufficient that the superintendent shall think it necessary to do the act complained of, and that there was in this case a legal justification made out under the statute. There is no room here to contend that anything was proved on behalf of the defendants.

Whether the superintendent really did think the exclusive possession of the land in question necessary for any purpose was not proved at the trial, and if some evidence of that kind had been offered, it might still have been made a question for the decision of the court and jury whether the power given by the act had been carried into effect in good faith and according to their intention. To admit that the mere assertion of an opinion, even on the part of the superintendent, must be held to be conclusive and incontrovertible, would lead to the most absurd consequences. Suppose, for instance, in the case of an ordinary farm lot, adjacent to the canal, the engineer should take possession of the half most remote from the canal, which was cleared and in cultivation, while he left the part immediately adjoining the canal in the possession of the owner,

there being no stone or timber or materials of any kind on the half taken by him, nor any reason that he could assign for interfering with the proprietor; and suppose that, in addition to this, the engineer were to allow another person to occupy the lands for ordinary purposes, from which he had removed the owner, I should conceive in such a case a jury would not feel themselves concluded by a mere general assertion on oath that the lands were necessary, though no reason for the necessity either was or could be pointed out.

But on the other hand it is evidently proper, and it is the intention of the statute, that the greatest confidence should be placed in the judgment and opinions of the officers employed when they are sincerely formed and expressed; and a jury would be acting most incorrectly, and not in a proper spirit if they were to set their own opinion in opposition to the judgment of the engineer upon any question of science. By such a course of conduct the object of the statute would be thwarted, and if, for instance, a jury imagining themselves to be better judges of the route than the engineers employed, or choosing to overrule their opinion upon the judgment of other persons, should give damages to a plaintiff, because in their view of the matter another route might have been taken, I should imagine that no judge would consider that the jury in such a case were acting discreetly or properly. The laws would afford a remedy against such a misapprehension on their part by allowing an appeal to the decision of another jury, and by extending this remedy even more than once, if it should appear manifestly to be

necessary. Now, in this case, the only reason surmised for pulling down the plaintiff's frame is that "he was a Yankee, and should keep no tavern there." The expression may be treated as an idle remark spoken hastily, but it forms the only evidence of the grounds on which the defendants acted. If they had better reasons they should have shewn them—that certainly was no reason. It is very possible that if it were determined to construct this great work wholly or in part by the labour of military artificers, it might have been desirable for ensuring discipline and for the better progress of the work that no tavern should be suffered to be kept in the immediate neighbourhood except such as the superintendent chose, and that these should be under regulations, like canteens in a garrison; and if this had been thought desirable, and had been stated to the legislature, it is very possible that they might have considered the object of sufficient importance to justify the restriction asked for, but nothing of this sort has been done, and certainly the contractors can make no such law.

Then as to the other ground on which the defendants apply to be relieved against this verdict, namely that the damages are excessive. It is very material certainly, and very proper to be considered, that my brother *Sherwood* who tried the cause has declared that he thinks the damages excessive. He thought them at the trial disproportioned to the injury, and he says that he thinks so still. I must also say, that upon the evidence adduced, I should have been better satisfied that the jury had found £50 damages than £100; but whatever we may

think on that point, the learned judge who tried the cause is, upon reflection, as clearly convinced as I am that in this action of trespass we cannot set aside the verdict for £100 on the ground of excessive damages without acting against the whole current of authorities upon new trials, which are so trite and so often cited, that it would be tedious to repeat them. If any special ground could be made out I would willingly yield to it, but I see none. It was stated as one ground of the argument that the court should more readily relieve against these damages, because in fact they were damages not against the defendants but against the military superintendent, or rather the government by whom they must eventually be paid. If that were so, it could scarcely be allowed to be a legal ground for relief, but I do not apprehend upon what foundation the fact is assumed. What may be the nature of the contract between the government and these contractors is not known to us, nor have we any need to enquire; but most certainly neither in law nor in reason is there any implied obligation on the government or the superintendent to bear out the contractors in any violation of the statute. In what they do, under the orders of their employers, they must of course be indemnified, but if of their own accord, and without legal authority, they do injury to others, they have no claim upon the public to make them good, nor can their act be regarded as the act of the government. Again, it was argued that by giving notice to the plaintiff before he set up his building that they would pull it down if he attempted it, the defendants gave him fair warning, and therefore he has no claim to vindictive damages.

That might be all very well if the defendants had shewn on what legal or reasonable pretence they gave any such notice, but they wholly failed to do this. If an inhabitant of this town were about to build a house upon his own land, and his neighbour or any other person should send him word that he had better forbear, because he intended to pull down the house if he persisted in putting it up; the fact of having given such a notice (unless there was some warrant for it) would rather give a claim for higher damages, because it would shew that the act was done deliberately, not under the excitement of a quarrel, but in calm defiance of the law.

On the whole it is clear that the court cannot properly interfere with the verdict in this case, and I think it is more just to the public service, as well as to the defendants, not to do it, because it is of consequence that all who are to exercise the powers given by the Rideau Canal Act should not labour under any false impression, but should be made aware,

1st. That they must act carefully and circumspectly in availing themselves of the privileges which the act confers.

2nd. That whenever their acts are brought in question they must be prepared to shew by legal evidence that they have kept within their authority.

3rd. That if they are prosecuted, and are either unable to justify their proceedings or neglect to do so, they are liable to such damages as a jury may think it right to give, and that although this court

has undoubtedly a right to exercise a control over the discretion of a jury, they will not do so, except upon the same principles as would justify such an interposition in other cases, and that they must be very strong grounds indeed that would lead the court to think such an interference proper in an action of trespass.

SHERWOOD, J.—I concur with the Chief Justice and my other learned brother in the opinion which they have formed on the question for a new trial in this case; but I am not prepared to express any opinion at this time on the general construction of the act to authorise the formation of a canal from the river Ottawa to lake Ontario. I give no opinion on that subject. There was no evidence offered at the trial to shew that the officer superintending the works on the Rideau Canal had set out or directed any specific quantity of land to be appropriated for the use of government, or that the frame of the house destroyed by the defendants was erected on lands necessary for the use of the canal.

MACAULAY, J. (after stating the case)—The affidavit offered by the Attorney-General on behalf of the defendants I think inadmissible. It discloses matter very proper to have been proved at the trial, but does not seem to contain matter discovered since the verdict, on which principle alone it could receive consideration.

This canal is an undertaking of his Majesty's government under the superintendence of a military officer of high rank and distinction; and as it must necessarily pass through various tracts of private

property, legislative aid became necessary in the outset. The provincial act, passed accordingly, recites the object of his Majesty's government, and the expediency of affording every facility. The first section enables the superintending officer to make surveys and take levels upon any lands within a prescribed range, and to set out and ascertain such parts thereof as he should think necessary and proper for making the said canal, &c., doing as little damage as might be in the execution of the several powers to him granted. It expressly authorises the officer in charge to set apart such lands as he might think necessary and proper for the object contemplated. Without this authority he could not do so, and this being the only legal authority, must be adhered to, for beyond its provisions no one can safely go. In acting under this statute it appears to me the head of the department should, in the first place, exercise his sound discretion in determining what lands should be set out for the canal, and in the next place cause the same to be set out and ascertained accordingly. The court is pressed to say whether in doing so he is amenable to any and what control. As a servant of the Crown he is of course responsible to his Majesty for the judgment and discretion with which he selects lands, as well as for the discharge of all his other duties. Independently of which he and those acting under him are liable to be proceeded against in the courts of justice whenever they infringe the private rights of individuals, however inadvertently; in other words, whenever by exceeding the powers conferred by the Rideau Canal Act they tortuously interfere with the property or possessions of any of the King's subjects. But as long as they confine

themselves within the statute, they are justified under its provisions; consequently, as long as a sound discretion is used in setting apart the lands requisite for the intended navigation no risk is incurred. Should any person, however, deny the power to appropriate any particular tract to the public use, he can institute a suit in order to obtain a judicial decision on the subject. In such action (if trespass) he would have to prove an act of trespass against the party prosecuted, after which it would be incumbent upon the latter to establish a justification under the act. Should it be proved that the superintendent had set out and ascertained the *locus in quo*, as in his opinion necessary and proper for the canal, I should think those facts would constitute a good *prima facie* defence. While I conceive, nevertheless, that every reasonable construction should be given to the statute, so as to afford the protection contemplated by the legislature I at the same time think it open to any party aggrieved to rebut the defence set up under colour of its sanction. If it could be shewn that the principal officer, or any of those acting under him, had not proceeded *bona fide* in ascertaining and setting out any particular piece of ground as necessary and proper for the work; if it were made appear that the act of parliament was resorted to under a pretence merely, the party being actuated by a different and therefore an unjustifiable object; should it be manifest and obvious that not a sound but an arbitrary discretion had prevailed, and that in fact the land evidently could not be requisite for the purpose alleged; or if it were established that they had not refrained from doing as little damage as possible, or, in the words of the act, "as might be in executing

the powers granted, but had wilfully or carelessly done otherwise," then in such like instance I am of opinion that the courts of the country, in construing and giving effect to the statute as respects the King's officers on the one hand, and adjudging upon the rights and properties of individuals on the other, would be construed to deny its operation to protect those whose conduct might be arraigned.

Still I would hold that a glaring want of discretion or a manifest abuse of the privilege granted by law could alone sanction the exclusion of the parties accused from the protection sought, when they could shew an ostensible compliance with the terms of the act. It should always be presumed, until the contrary appears, that the agents of the government act *bona fide* and discreetly in whatever they do in the discharge of their public duties, and it should equally be presumed that courts and juries will do so likewise when called upon to adjudicate between them and others of his Majesty's subjects. If in the opinion of the court the jury should inadvertently exercise an unsound discretion upon any matter within their province, relief may be afforded by a new trial; and should the court concur in their finding on any occasion, the parties interested may secure to themselves an appeal to superior tribunals, as far as such privilege can be enjoyed by suitors generally under similar circumstances.

To sustain a justification under the first section of the Rideau Canal Act it seems to me that not only a sound discretion should be used (which will be presumed in the absence of proof to the con-

trary), but that it should be further proved that the land in dispute was set out and ascertained as proper and necessary for the canal by or under the direction or authority of the superintending officer—set out and ascertained by some regular act or process susceptible of proof, and which when necessary should be proved. It is important that all private estate to be appropriated to this undertaking should be accurately defined, not only to guide those employed in the work, but to apprise the owners of the extent to which they are entitled to be abridged, as well as to enable them to claim the remuneration to which they become entitled, and not the least essential to enable the public agents to justify under the act when called upon to do so by legal proceedings. This act follows very closely the Welland Canal Act. The Welland Company derive under their act of incorporation powers fully as extensive as the Rideau Act confers with respect to the right of appropriating private property, and many of their provisions will upon comparison be found almost similar.

The officers conducting the Rideau Canal service, and the agents of the Welland Company, act under similar protection, and are subject to equal responsibility to the laws of the province. I do not consider that the circumstance of remuneration, according to the valuation of referees, would entitle the one or the other to monopolise whatever lands they might please. The power to appropriate is with a view to the public good, to which private interest and inclination is made to yield. Remuneration may be long deferred ; many might not be willing (unless

compelled) to submit to the estimate of others, or perhaps to part with their property at all, and when forced to do so for public purposes no more could be legally exacted without consent than may be necessary and proper for the object intended. It is unnecessary to remark that as the laws we enjoy extend equal protection to all, and are open to all, that anyone who considers himself aggrieved has a right to appeal to them for redress; and that the court must indifferently administer justice, according as the facts in evidence in each particular case shall warrant and require. The Rideau Canal being an object of great public moment, is a very good reason for the legislature granting powers and facilities not previously possessed, but when public operations of this kind clash with private rights, the authority given over the latter should be kept fully in view. The object being a public or valuable work, cannot weigh with a court of justice in applying the statute to individual suitors, because it affords no satisfaction to the party in whose case it is urged. He cannot be compelled to sustain any disturbance or loss, by reason of the public and beneficial undertaking, beyond the peremptory provisions of law, unless personally assenting. Such being the case, and considering the scrupulous regard which the constitution pays to private rights, also the strict and rigid rules by which the courts must govern themselves in judicial enquiries, too much circumspection cannot be observed in carrying into effect the powers of the statute.

To advert more especially to the present case, I am by no means prepared to say that the *locus in*

quo may not with great propriety be set apart for the canal; but the court must decide upon the evidence adduced, and upon that alone. If previous to the trespass complained of it had been set out as thought necessary and proper, the fact should have been proved; in the absence of proof it must be taken not to have been so set out. Then it appears a trespass was committed without justification, and consequently the damages were in the discretion of the jury, subject to the review of the court. When the court is satisfied the jury have exercised a wild discretion, by giving outrageous, intemperate, or excessive damages, relief may be afforded; but this being a delicate prerogative of the court, is reserved for extravagant cases. The principles which govern the court have been frequently and on the present occasion were fully and ably discussed.

On some occasions the actual injury inflicted should form the measure of damages, as where an officer acting *bona fide*, and intending to confine himself within the act, unintentionally and innocently exceeds his powers; there the conduct of the party and the important public service in which he is engaged are proper to be regarded by the jury in estimating damages, though not by the court in determining whether the facts disclosed amount to an actionable trespass in law or not. Notwithstanding a strict right of action may exist, the circumstances would not warrant vindictive damages. But if, under the pretence of authority, an injury is committed; if improper motives are shewn; if a needless excess of damage is in proof wilfully and knowingly committed, the jury have a right to punish the offenders,

and the absolute protection which the statute affords when conformed to strengthens the call for damages when it is abused to sinister objects.

In the present case some part of the defendant's conduct would argue the absence of a justifiable motive, and although the expressions used may have been spoken in haste, or under excitement, still it was properly left to the jury to pass an opinion upon the whole merits of the transaction, as in evidence. They have found that the defendants were actuated by improper motives, and that they transgressed the law. The testimony warranted such finding, and having so found, I do not feel that we are at liberty to say they have acted incorrectly. The verdict is right in law, and though less damages would doubtless have redressed the plaintiff, yet I cannot declare that the jury have so far exceeded the discretion reposed in them as to warrant a new trial for excessive damages. I think the rule *nisi* should be discharged.

Per Curiam.—Rule *nisi* discharged. (a)

Regula Generalis.—Ordered that the first Friday, the second Monday, and the second Wednesday in every term, be paper days for the arguing demurrers, special cases, special verdicts, or points reserved; and that on those days the paper list be gone through before any other motion or business is entertained.

Edward C. Campbell, Walter Hamilton Dickson, and John Bogart, Esquires, were called to the bar, and sworn in this term.

(a) "Vide, 1 B. & C. 163; 2 B. & C. 763; 2 Bl. 1141."

EASTER TERM, 11 GEO. IV., 1830.

Present :

THE HON. JOHN BEVERLEY ROBINSON, Chief Justice.

“ LEVIUS PETERS SHERWOOD, Judge.

“ JAMES BUCHANAN MACAULAY, Judge.

ROWSELL V. HARTWELL.

A rule for payment of costs had been granted in this cause. The court, on the usual affidavit of the service of that rule and demand, made the rule for an attachment for non-payment absolute in the first instance.

HOWE ET AL. NEWMAN ET AL.

This was an action of covenant brought upon an agreement, by which, as it is stated in the declaration, the plaintiffs covenanted “that they would quarry and deliver, at or near the lime-kiln, on the lot of land occupied by Colonel Ferguson, adjoining the north easterly part of the town of Kingston, two hundred toises of stone for building the piers and abutments of an intended bridge over the great river Cataragui, and that all the stone should be good sound quarry stone, subject to be inspected by the overseer of the Cataragui Bridge Company; and that if any part of the said two hundred toises of stone should be condemned by the overseer, either as not sound or as not fit for the intended purpose, the same part so condemned should be replaced by the plaintiffs, and at their own proper costs and charges. All

of which said two hundred toises of stone were to be quarried and delivered, as before set forth, as fast as possible, and to be always ready when required for the said work." And the said defendants on their part covenanted "that they would pay to the plaintiffs the sum of 6s. 9d. for each and every toise of stone—that is to say, the sum of 6s. 9d. for every 216 feet, cubic measure, of stone, when laid in the wall, the said sum to be payable within one-third of the measurement as the said work should progress, and the residue on the fulfilment of the contract." And in conclusion, each party binds himself in a penalty of £200 to perform their part of the agreement. The plaintiffs then aver that although they have performed all things incumbent upon them according to the true intent of the agreement, and although they have well and truly *quarried* and delivered the said 200 toises of good sound quarried stone *near the said lime-kiln aforesaid*, subject to be inspected, as in the said agreement is mentioned, and although the said stone was always ready for the said work, &c., yet protesting that the said defendants have not performed anything on their part to be performed, the said plaintiffs aver that the defendants did not, nor did either of them, pay, &c., to the plaintiffs the sum of 6s. 9d. for each and every toise of stone so quarried and delivered, as in the said agreement is mentioned—that is to say, within one-third of the measurement of the said stone as the said work did progress, and the residue of the said sum on the fulfilment of the said contract and delivery of the said stone, but on the contrary thereof, although the said contract had been long since fulfilled, and the said stone delivered as aforesaid, yet the defendants have not

paid the said sum of 6s. 9d. in manner as aforesaid for each and every toise of stone so delivered in manner as aforesaid, amounting in the whole to £67, 10s. ; but to pay the same, or any part thereof, the said defendants have hitherto wholly refused, contrary to the effect of the said agreement. In the second count the agreement is stated in the same terms, and the plaintiffs aver that although they have always been ready and willing to fulfil, &c., on their part, &c. ; and although they have, in part performance of their covenant and agreement, well and truly quarried and delivered for the defendants a large quantity, viz., 195 toises of good sound quarried stone at the said lime-kiln in the said agreement mentioned, subject to be inspected, &c., as in the said agreement mentioned ; and although the stone was always ready for the defendants, according to the agreement, and although the defendants received and took away the said stone so delivered, and laid the same in the walls and abutments of the said bridge, yet the defendants did not pay or cause to be paid to the plaintiffs the said sum of 6s. 9d. for each and every toise of stone so quarried and delivered as aforesaid, as in the said agreement is mentioned : that is to say, within one-third of the measurement of the said stone as the said work did progress ; but, on the contrary, although often requested, the defendants have hitherto wholly refused to pay to the plaintiffs, in manner as aforesaid, the said sum of 6s. 9d. for each and every toise of stone so delivered as aforesaid ; by reason whereof the plaintiffs have been unable to perform the said covenant, and have been prevented and hindered from quarrying and delivering the residue of the said stone, to wit, five

toises of stone according to the said agreement. And so the plaintiffs say that the defendants have not kept their said covenant, but have broken the same, &c.

The agreement is afterwards set out on *oyer*, not varying from the statement of it in the declaration; *non est factum* and four special pleas were pleaded. The plaintiffs took issue on the two first special pleas, and demurred to the two last, and last term this demurrer was argued. The judgment of the court was deferred until this term, and was given on the declaration only.

And the whole court were of opinion that the second count was not sustainable. For though the plaintiffs in that count do aver that the 195 toises which they say they delivered were laid in the wall, they do not claim according to the number of toises of 216 cubic feet as measured in the wall; nor do they aver how much the 195 toises so quarried and delivered measured when laid in the wall; and they state therefore as a breach that the defendants did not pay 6s. 9d. for each toise of stone so delivered as aforesaid—that is, delivered at the lime-kiln, which they never covenanted to do. The want of a statement what the plaintiffs are entitled to claim by measurement in the wall, and still more that such a measurement has taken place, are fatal objections to this count.

As to the first count the *Chief Justice* and *Sherwood, J.*, were of opinion that it was also bad for want of an averment that the stone had been laid in

the wall and measured there; but *Macaulay, J.*, thought that although the plaintiffs did not specially aver that the stone delivered by them was used in the work, still it might be fairly intended under the pleadings on this demurrer. That if it were not used in the work, much of what the plaintiffs affirm, and the defendants do not deny, would be untrue, although the objection would be fatal on special demurrer.

On the subsequent pleadings no judgment was given as the declaration was held bad by a majority of the court.

Per Curiam.—(Diss. *Macaulay, J.*)—Judgment for defendant.

GARDNER V. STODDARD.

In covenant, when the plaintiff has a verdict for £2 only, the court held he was not entitled to King's Bench costs. It is not necessary for the defendant to apply for leave to enter a suggestion to deprive the plaintiff of his King's Bench costs.

The Solicitor-General had moved last term for an order on the master to revise his taxation of costs in this cause, or for leave to enter a suggestion on the roll that the case was of the proper competence of the district court, in order to deprive the plaintiff of King's Bench costs under the stat. 58 Geo. III., c. 4. The defendant had leased to the plaintiff a saw-mill, and defendant covenanted to put it in immediate repair. This action was brought for not repairing, and the plaintiff had a verdict for £2 damages. No certificate was obtained or applied for, and the master had taxed full costs under the authority of

McMurray v. Orr. (a) The court took time to consider, and not agreeing delivered their opinion *seriatim*, as follows :

MACAULAY, J.—After final judgment no suggestion can be entered, and the question is, whether plaintiff can be restrained from taxing more than district court costs upon this record and verdict, or whether any suggestion be necessary of the facts which (exclusively of the verdict) shew the cause a proper one to have been brought in the district court. At the time when the 58 Geo. III. was passed, the district courts were constituted and held under the authority of 34 Geo. III., c. 3, and 37 Geo. III., c. 6. These two statutes were repealed by 2 Geo. IV., c. 2, 1822, which last act constitutes the district courts, with power to hold plea in all matters of contract from 40s. to £15; and when the amount is liquidated or ascertained by the act of the parties, or the nature of the transaction to £40. Also in tort respecting personal chattels when the damages to be recovered shall not exceed £15, and the title to lands shall not be brought in question.

The first question is—Can covenant for damages be brought in a district court? All matters of contract include contracts under seal as well as simple contracts, and I should think both descriptions equally within the jurisdiction. Then is the 58 Geo. III., which was made to apply to the 34 & 37 Geo. III., to be extended to the 2 Geo. IV., which repealed them and constituted new district courts? Assuming for the present that it is, the next question is, To what

(a) Page 3. See *Wheeler v. Sime*, 3 U. C. Q. B. 265.

suits does 58 Geo. III. extend? Some obscurity exists in the use of the word withdrawn. I do not take it literally, but merely to mean not instituted, as if it were enacted, "unless the judge, &c., certified that the cause was a proper one to have been instituted in the King's Bench and not in the district court." It seems to me that it extends to all suits that might have been effectually carried on in the district courts, although commenced in the King's Bench, and to no others. Then the question arises, what is the jurisdiction of these courts? Is it over all transitory actions, the defendant being within their jurisdiction; or local, over such causes of action merely as arise within the limits of its jurisdiction? If, as I believe, generally over all suits, depending only upon the residence of the defendant, then how is this court to be informed that the suit is of the competence of the district court, and how is the defendant to avail himself of the provisions of the 58 Geo. III., as to costs

It seems to me at present that a suggestion is requisite unless it appear unequivocally on the record; and even then I doubt whether some entry is not necessary in the nature of a suggestion. It is obvious the King's Bench has a concurrent jurisdiction, and a case may at *nisi prius*, though not before, appear to be of no competence of the district court. The judge of assize, if moved in such a case, may certify, and there is an end of the matter, and the plaintiff is entitled to full costs; but if the plaintiff has omitted to move, or should the certificate be refused, it would not appear, unless by the amount of the verdict, that the suit was within the district

court cognisance. Had it been intended that the verdict should regulate, why was it not so expressed? As thus, that suits which by the verdict rendered should appear to be of the proper competence, &c.; or suits in which the plaintiff shall not recover more than such sums, repeating the district court limits. It may, in the first place, be very doubtful whether a suit is of the proper competence or not; for example—the cause of action may have occurred abroad or in one district, defendant residing in another. When the question occurs as to the origin of suits over which these inferior courts have jurisdiction, it may be very doubtful whether the title to land comes in question or not. In cases of doubt a certificate would settle it; but if the certificate should be refused it might be very important to have an adjudication of this court on the point. Again, as justifying resort to the King's Bench, admitting the district court jurisdiction, it might be urged that defendant contracted in one district and afterwards removed to another; or the sufficiency of the cause in law might be questioned; or it might be alleged that witnesses resided in different districts, and such fact might be contested. It might be doubtful whether the facts establishing a claim to £30 prove a liquidated demand or not. Indeed various points of law might arise, and various facts be contested in acting under the statute. Yet still the question remains how are they to be disposed of? If the verdict is to regulate, the judge at *nisi prius* must hear, examine, and decide the facts as well as law, unless he is disposed to reserve any legal point for further consideration. But I do not perceive why the verdict should regulate, for it seems obvious to

me that the propriety of resorting to the King's Bench does by no means generally depend upon the amount to be recovered, but upon various collateral circumstances. The verdict may be reduced by set-off from £100 to £5, yet it would not appear on the record. To ask a judge to certify that such a cause was a fit one to have been withdrawn from the district court, *i.e.*, not brought into that court, would be inconsistent, if it were perfectly apparent to the court that the plaintiff could not have effectually prosecuted and obtained his right there, if it were plain that the district court could not have jurisdiction over the matter. The act applies only to suits which might be brought in the district court, but which for special reasons were withheld and instituted here, and the judge of assize is required to exercise a discretion in such cases.

In assumpsit or tort various defences under the general issue may reduce the verdict from a *prima facie* claim far beyond to a recovery much within the competence of the district court in point of amount; payment of money into court—partial payments—accord and satisfaction to a certain amount—a dispute how far the articles sold constitute necessities recoverable from an infant—value—failure of evidence—want of notice of dishonour, by which whole counts may fail—insufficient evidence to sustain some counts in other respects—conflicting testimony left to the jury, &c. In tort, trover for example, a return of the chattels—opposing testimony as to value, &c.; in short a great variety of circumstances in mitigation of the plaintiff's *prima facie* case, might

frequently weigh with the court or jury in reducing the amount to be recovered; and as the act does not provide that the amount recovered is to be the criterion, but whether the case, being originally of the competence of the district court, was properly commenced in the King's Bench, I do not think the conclusion can be drawn from the verdict alone. I think the act only includes cases which by the plaintiff's own shewing, independent of the defence, were competent to the district court. If that appear conclusively on the record, it is sufficient; if not, it should be suggested. If it appear at *nisi prius*, the judge may certify or not in his discretion. If in doubt and willing to give costs, a certificate would end the matter; but if in doubt and not willing to give costs, the facts as elicited at the trial being suggested without leave to traverse (but with permission to demur), would bring the question before the whole court. It is questionable what considerations are to be entertained in determining whether a suit is proper to be withdrawn from the district court; that is, whether the merits of the case itself as respects the intricacy of legal questions, &c., ought not alone to be regarded; or whether extraneous facts—as the residence of the parties—the witnesses, &c.,—ought to be admitted. Upon this subject I forbear expressing any particular opinion, though I incline to think extraneous facts ought rather to be rejected than received. A contrary practice has, however, hitherto obtained, and perhaps the act requires amendment on this head.

Bearing in mind that the district courts are courts of inferior and of local jurisdiction, I would enquire

into the English practice in analogous cases. The right to costs, given by the statute of Gloucester, was first restrained by 43 Eliz. c. 6. The 3 Jac. 1, c. 15, makes a further exception in favour of citizens or freemen of London residing within the liberties thereof, when the debt to be recovered by the plaintiff shall not amount to 40s. This act is extended by various subsequent enactments. The mode of taking advantage of these acts is by plea, suggestion, or motion. If the bringing a suit be absolutely prohibited, it may be pleaded; otherwise the more proper mode seems to be an application to the court, by affidavit, for leave to enter a suggestion of the facts necessary to entitle the applicant to the benefit, which may be traversed or demurred to. There are various cases on the subject.—Str. 46, which case has been overruled by 2 H. Bl. 354, and 9 East. 322; Str. 50, 974, 1120, 1191; 2 Wils. 68; 3 Wils. 48; Barnes 354, 470; Sayer 273; 8 East. 239; 4 M. & S. 171; 1 Chit. Rep. 636, n.; 1 Bing. 100; 5 Taunt. 36; 2 Taunt. 169; 1 Taunt. 397; 5 Taunt. 820; 3 M. & S. 591. As to the mode of entry, it might be alleged simply that it appeared to the court that the case was of the proper competence of the district court, or by the report of the evidence at the trial, which being received under oath, is equivalent to an affidavit. Such a suggestion not being a fact, but a legal result from facts, could not be traversed. The facts themselves might be entered with a view to a demurrer, but not a traverse, after the same had been proved at *nisi prius*.—Cases Temp. Hardw. 126.

The present is an action of covenant.—Breaches are suggested by which it appears that the plaintiff goes

for unliquidated damages. The defendant does not deny the breach, but denies the covenant. The issue is upon *non est factum* of a deed involving interests on the face of it, liable to exceed the jurisdiction in the contemplation of the parties; and how can it be inferred from the amount of damages assessed, which are collateral to the issue, that a suit in which such issue was to be tried was competent to the district court, or how could it be foreseen what the issue would be? The case is surely *primâ facie*, properly commenced in the King's Bench. The defendant denied his deed; this is found against him. What evidence was received on either side in support or in reduction of damages we know not. Plaintiff may have given *primâ facie* evidence of much more than was recovered. Various mitigating circumstances may have been offered. There may have been much conflicting evidence as to the amount, and it may in fact be true, for all that appears, that the district court could not have dealt with the case. I cannot infer that because the damages are only £2, therefore it was a case competent to the inferior court. I should desire to know the fact in evidence, and the testimony adduced, to enable me to determine that question. If it appeared to be so, I would approve of a suggestion to that effect; but in the absence of any such suggestion I do not think that the defendant is entitled to reduce the plaintiff's, or to be allowed his own costs in taxation.

CHIEF JUSTICE.—This is an action of covenant brought upon an agreement by a tenant against his landlord for not putting premises in repair. The

claim for damages is left perfectly open by the agreement; they are laid in the declaration at £500. On *non est factum* pleaded the parties go to trial, and a verdict is rendered for the plaintiff with £2 damages. Judgment is entered on this verdict in the vacation after last Michaelmas Term, the master taxing King's Bench costs; and now the defendant moves to revise taxation in order that the plaintiff may be restrained to district court costs under the provincial statute; and he also prays liberty to enter a suggestion that the cause was within the jurisdiction of the district court, conceiving, I suppose, that such a suggestion may be necessary to entitle him to the benefit of the statute referred to. Though as between the parties this question merely involves the value of the difference of King's Bench and district court costs in this particular suit, the decision upon it is of considerable importance if it is to settle the proper method of giving effect to the statute 58 Geo. III. It is many years since that act was passed, and one would imagine that the consequences of its provisions must have been so far ascertained and established by this time as to have led to an understood practice under it.—But there seems to be doubts as to the real intention and sound construction of the act, and it is of consequence that they should be removed.

It was suggested when this cause was first mentioned, that in construing the statute attention must be paid to those words "fit cause to be withdrawn," &c., and that those words seemed to restrain the application of the statute to such cases as, by the statement of the cause of action set forth in the

declaration, appeared to be such as the district court could have entertained, because, it is argued, the judge could not certify with respect to any cause that it was a fit cause to be withdrawn from the district court, when by the record it appears manifestly that the cause was such as never could have been brought in that court. The judge consequently, it may be argued, cannot give such a certificate whatever the cause of action might in fact be.

Upon consideration I do not feel this difficulty. I cannot suppose that the legislature meant by the term "withdrawn," as it is used here, a taking from the district court suits that had actually been commenced there, because they doubtless knew that such an expression would in that sense have been inapplicable to the course of proceeding; the word withdrawn is, I think, inappropriate. The intention of the act would have been better expressed by the term withheld from than withdrawn from the district court, and that is the meaning which I attach to it, as if the legislature in other words required the certificate to be that the cause was not a fit cause to be instituted in the district court.

Then if no difficulty arises from the peculiar expression "withdrawn" (and I think none does) the statute is very similar in its intention to many that have been passed in England for confining small causes to inferior courts; and having considered the cases, of which there are many decided upon those statutes, and keeping them in view as far as they are applicable, I do not perceive a difficulty in giving to the statute the effect which the legislature intended.

In the first place, to use the words of the statute, is this action “of the proper competence of the district court?” This question, I conceive, is now to be answered upon a full view of the case in this stage—*i.e.*, after the verdict—when the evidence has disclosed the true circumstances of it, and the jury have reduced all doubtful facts to legal certainty. Knowing what is now known of this action, I am of opinion that in the first place, so far as amount is to be considered, it was within the proper competence of the district court. In an action of covenant unliquidated damages may be recovered in that court to £15. Here the jury have given £2; that ascertains that the damage to be recovered in this action did not exceed two pounds. It is true the plaintiff has laid his damages at £500—a sum far beyond what he could have recovered in the district court; but that is his assertion merely. It affords neither proof nor argument of the amount of damages. He may have estimated his damages sincerely at a large sum, or he may not, and his having laid them at £500 does not prove that in this action he could not have recovered in the district court his real damage, now ascertained to be only £2; but simply that he could not have recovered there upon this declaration. The real cause of action and the cause of action which the plaintiff chooses to state are very different things. The statement of damages is not a traversable allegation. If the deed set out shewed that the inferior court could not determine upon it without exceeding its jurisdiction the case would be different; but here is no such difficulty. In England, when a debt is sued for, and the defendant’s attorney makes oath that it is under 40s.,

and this is not denied by the plaintiff, the allegation is entertained against the record, and the court stay the proceedings. So they do when the same fact appears upon the admission of the party. 4 T. R. 495, and 5 T. R. 64; and many other cases shew that the court of King's Bench receive proof of the true debt or damage to be recovered in opposition to the allegation on the record, and upon ascertaining that the amount is really so small as to make it beneath the dignity of the court to entertain the suit they stay the proceedings. Then, surely, in order to give effect to this statute, which in its nature is remedial, the court must take the record and verdict together; and it cannot be said that the finding of a jury is less satisfactory evidence of the true amount to be recovered than the affidavit of the defendant though uncontradicted. The plaintiff's recovery is not *secundum alegata* only, but *secundum allegata et probata*, and it cannot therefore be left to himself to measure his own damages and entitle himself to the superior jurisdiction by his mere statement of the cause of action.

Then if his laying his damages at £500 does not exclude the application of the statute when they have been found to amount to no more than £2, what other reason is there why the plaintiff in this cause should not be confined to district court costs, having obtained no certificate such as the statute directs? I find no reason on the record. I see nothing in the statement of the agreement and the breach that would take it out of the cognizance of the district court, and there is no reason why an action of covenant in particular should be exempted from the

operation of the statute. There have been cases in England and in this province in which the judges have considered actions of covenant so frivolous that they have certified under the 43 Eliz. when the damages were small, so as to deprive the plaintiff of his costs. But then it may be said that although there is no reason apparent on the record why the action ought to have been brought in the King's Bench, there may have been good reasons arising from matters *dehors* the record; undoubtedly there may have been; and hence, in my opinion, arises the necessity for the certificate which the statute authorises the judge to give. There may have been difficulty in the case, or difficulty in bringing the defendant into court, or in compelling the attendance of witnesses from other districts, all furnishing good claim to the certificate. The plaintiff, however, has moved for no certificate, and therefrom I infer that he had none of these grounds for moving. The case consequently comes before the court upon a verdict of £2 without certificate, and why is not the statute to have its effect? I see no reason. The officer, however, has taxed King's Bench costs, and to be relieved from them the defendant prays to have the taxation revised. In my opinion it ought to be.

But then it has been conceived that perhaps a suggestion is necessary in order to give the defendant the benefit of the act. It is plain no suggestion can be entered after final judgment—2 H. Bl. 352—because the record must be still open, the suggestion being traversable as to facts stated, and it may be demurred to. But if the parties were still before the court, the necessity for a suggestion does not strike

me. In the numerous cases in which suggestions have been admitted to be entered for the purpose of giving defendants advantage of the court of conscience acts, the necessity of a suggestion is apparent. Those acts expressly state that the inferior court has jurisdiction when both parties reside within the county, and in some of them other circumstances are required to give jurisdiction. These facts are not apparent on the record nor ascertained by the verdict, and therefore as the acts by the express terms of them have no application unless such facts exist, their existence must be judicially ascertained. Hence arises the necessity of the suggestion. The jurisdiction of the district court depends on no such circumstances. The nature of the action and the damages to be recovered being shewn, the question of jurisdiction is resolved. It is true, that if the defendant lived out of the district in which the plaintiff in this action resides, the plaintiff could not bring him into the district court of his district; and it is held unreasonable to compel him to follow the defendant into the district in which he happens to reside. It is true, also, that if the plaintiff's witnesses reside in different districts from that in which the defendant lives, they could not be compelled to attend by subpoena from the district court. The court, however, has jurisdiction of the action. These are mere practical inconveniences, which when they occur prevent the plaintiff from resorting to it, and when they can be shewn to have existed, the plaintiff urges them at the trial or immediately after as his reasons for preferring the higher court, and he obtains his certificate and full costs. He has but to be vigilant and not to omit to ask it. The facts are stated in the presence of both parties,

and before a judge who has heard the merits. They can be discussed and determined at the trial with little trouble or expense, and it was then that in my opinion the legislature intended the point to be settled, and it is then that I have seen it settled in ordinary practice since the passing of the statute; and I do not see what the defendant has to suggest or why he need be put to the expense of suggesting anything. The cause of action and the ascertained amount constitute his case, and the plaintiff is to meet it by applying for a certificate at the trial. If he does not, the officer ought not, I think, to tax King's Bench costs. It may be said that actions of covenant are in their nature proper for the cognizance of the King's Bench, and that it is unwise to force them into the inferior jurisdiction; but they are unquestionably "of the proper competence of the district court;" and since the legislature has made the provision in question we must give it the effect they intended. Doug. 246, Str. 46, 974, 1120, and 1 Ea. 352, are cases which have appeared to me clearly to point out that suggestions were in those cases required for reasons having no application here. It does not strike me that it is repugnant or insensible to require the judge to certify in a case when the small amount of damages is occasioned by a large set-off or by any other fact which when disclosed shews that the cause could not have been instituted in the inferior jurisdiction. That is precisely what, in my opinion, the legislature meant should induce him to certify. This certificate is not wanted for his information; it is the mode in which he is to convey to the court above the information which he and not they have had an opportunity

of acquiring. His finding it clear that the cause could not have been brought in the district court is surely no reason why he should not and need not certify. It is simply his warrant for certifying.

SHERWOOD, J., fully concurred with the *Chief Justice*.

Per Curiam.—(DISS. MACAULAY, J.) Rule granted.

INGRAHAM V. CUNNINGHAM.

In trespass *de bonis asportatis* an affidavit stating that defendant took possession of plaintiff's goods, and still keeps possession thereof, *held* sufficient to warrant an order to hold to bail.

An application had been made to *Macauley*, J., at chambers, for an order to hold the defendant to bail in an action of trespass. At his request, and in order to settle the practice as to what an affidavit for such purpose should contain, it was moved by *Draper*, on an affidavit made by the plaintiff setting forth that the defendant broke into plaintiff's dwelling house, and by force expelled him therefrom, and took possession of plaintiff's goods to the value of £100, and still keeps possession thereof; stating also generally that defendant at the same time assaulted and beat plaintiff.

CHIEF JUSTICE.—By the forms in use in England it seems that in an action of trover no special statement is required; but arrest in actions of trespass seems to be very rare. If the taking possession of the goods were not sworn to, and the matter depended on the trespass to the person, I should think a more special affidavit necessary. But I see no

material difference between trover and trespass *de bonis asportatis*. In either case the verdict would be regulated by the value of the goods.

SHERWOOD, J.—I should think this affidavit insufficient to warrant an arrest for the assault only. The forms require a much more particular statement. But for taking and keeping the goods I think this sufficient, as it is not to be presumed that defendant had a just cause for so doing.

MACAULAY, J.—In deference to the usual practice I shall not object to the order going. I do not think the legislature intended to encourage arrests, but left it to the discretion of the judge to decide whether the case as disclosed warranted such a proceeding. This discretion can only be exercised where the facts are fully and certainly set forth in the affidavit. In 1 Archb. Pr. it is said, “In trespass defendant is not to be holden to bail except on judge’s order in cases of very violent and cruel assaults.” It is in the discretion of the court or judge if the cause of action be attended with aggravated circumstances, and it is apparent the damages will exceed £10. This, however, is only done where good cause is shewn, and upon an affidavit of facts. 1 Sell. Pr. 36, Sid. 307, 189. In 1 Mod. 2, and 6 Mod. 230, bail was denied, though in gross batteries.

In the note to Archbold’s forms, p. 14, it is said, “In affidavits of this description it is merely requisite to state the facts of the case specially as they really are, with certainty and precision, and that the facts so stated disclose a case sufficient to warrant

the judge in making the order required." I think the circumstances should be stated as fully here as in England, and the apprehension of departure from the province should even be more strongly asserted than in an action of assumpsit, by disclosing the grounds of the plaintiff's apprehension.

Order to arrest for £100 granted.

MCDougall v. Young.

In debt on bond conditioned for the payment of rent, a plea "that before the rent became due plaintiff assigned the premises to A. B., to whom defendant afterwards paid the rent," *held* good on demurrer.

Debt on bond, conditioned for the payment on given days of the rent of certain premises, leased by plaintiff to defendant. Breach, that the rent was not paid &c. Pleas 1st—that plaintiff, before the breach of the condition declared on, and before any rent became due, sold the premises in question to another person. 2d. A surrender of the lease under which defendant held. 3d. That only one payment has become due, before which plaintiff assigned the premises to another person, and that when such payment became due defendant paid it to the assignee. To these pleas the plaintiff demurred. Judgment was given on the last plea only.

Solicitor-General. — In order to support the third plea the defendant should have shewn that the assignment on which he relies was in writing; otherwise it could take no effect, and the payment he pleads would be perfectly nugatory. Or he should have pleaded that on the assignment being

made he attorned to the assignee; for without this the statement is incomplete, and does not constitute a legal defence. But independently of this it is not competent to a lessee to dispute or deny the title of him under whom he went into possession. This plea is tantamount to *nil habuit in tenementis*, which would not be sustainable in such a case; 5 T. R. 5. Nothing can discharge the tenant from payment but an eviction. He cannot set up the title of a mortgagee against the mortgagor, 1 T. R. 760 (n. a.), 3 T. R. 441, 7 T. R. 535.

Spragge, contra.—The rent is incident to the reversion, and the tenant is entitled to it without attornment; 1 Woodf. 206, 403. And although a defendant is estopped from denying his landlord's title at the time of the demise, he is not estopped from shewing that during the demise that title expired; 4 T. R. 682, 3 M. & S. 516, 8 T. R. 487, 2 Wills. 143, 3 Saund. 418 (n. 1.) If lessor grant his reversion, he cannot have debt for the rent, but his grantee may; Esp. N. P. 202. In this case, payment to the grantee is pleaded, which is admitted by the demurrer.

CHIEF JUSTICE.—The third plea is clearly sustainable, and the defendant is therefore entitled to judgment without adverting to the other pleas. The condition of the bond is, that the defendant will pay the rent at four quarterly periods to the plaintiff (the lessor), his heirs or assigns. Defendant pleads that only one payment has fallen due; that before it became due plaintiff assigned the premises to one Joseph McDougall, and that when the first payment

became due, he paid it to the assignee. By law the assignee in such a case would be entitled to the rent, the contract being entire, and no part falling due until after the plaintiff has parted with the reversion; and it is consistent with the express condition of the bond declared on that the payment should be made to his assignee. The bond is not therefore forfeited; Cro. Car. 188, Co. Lit. 152, a. By statute, an apportionment of the rent, as to time, is provided for in some cases; but not upon an assignment of the reversion, and the whole rent was in this case properly paid to the assignee.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Curiam.—Judgment against the demurrer.

BENHAM v. SHAW.

In Michaelmas Term last, a rule *nisi* for judgment, as in case of a nonsuit, had been granted in this cause, for not going to trial at the preceding assizes, pursuant to notice; which rule was discharged at the instance of the plaintiff, on the terms of his paying the costs and entering into a peremptory undertaking to go to trial at the next assizes. — And the court now, on motion of *King*, made the original rule absolute in the first instance, on the ground that the plaintiff's own laches had deprived him of the opportunity of discharging the rule. (a)

Rule absolute.

(a) See C. L. P. Act, 1856, sec. 151; Consol. Stat., U.C., ch. 22, sec. 227.

THE KING v. THE JUSTICES OF NEWCASTLE.

A writ of *certiorari* will lie to remove orders of sessions relating to the expenditure of district rates and assessments; and the Attorney-General, on behalf of the Crown, has a right to have it issued.

The *Attorney-General*, on behalf of the Crown, applied for a writ of *certiorari* to remove all orders, rates, assessments, accounts, &c., had before the justices of the district of Newcastle since the 1st of January 1829, touching or in any wise concerning the erection of any building as a new gaol or courthouse within the said district, &c. Argued—that all orders respecting building a new gaol affect the public money of the district, and the King is interested in its being legally expended. A *certiorari* is the first step to bring up the proceedings to see if they are right or wrong.—4 Burr. 2458. There are many instances of removing orders of sessions, even when parties are concluded by statute; for the Crown is not affected unless particularly mentioned.—Ld. Raym. 580; 5 T. R. 279; Doug. 116. The court would not, perhaps, interfere in any order, the subject matter of which is left to the discretion of the justices; but when they have no authority the court clearly will control them. As this application is on behalf of the Crown, no notice is necessary. The general principle is, that whenever the Crown thinks necessary, it can remove proceedings, because that is the first step the Crown takes to litigate its rights.—1 Ea. 303; 4 M. & S. 447; 2 T. R. 89; 4 T. R. 591, 161; 2 M. & S. 321; 2 Ea. 244; 15 Ea. 333.

After taking time to consider, the opinion of the court was delivered by the

CHIEF JUSTICE.—This application, with reference

to the nature of the order sought to be removed, is somewhat new in this province, though not absolutely without precedent. It is an important case, and we have so considered it. We have been made aware from statements in argument that great inconvenience might follow our decision, whether we awarded or denied the writ. (a) Upon full examination we have felt ourselves compelled to grant the *certiorari*. If the application were made otherwise than by the *Attorney-General* and professedly on the part of the Crown, we should require to be satisfied that those statutory provisions had been complied with, which declare that no order of sessions shall be removed by *certiorari*, unless the writ be applied for within six months from the order being made, and unless six days' notice of the intended application be given to the justices, that they may be prepared to resist the motion in the first instance. But it is the King who applies for it, through his proper officer, professedly on public grounds, and in order to restrain a proceeding which it is alleged is illegal. This wholly changes the nature of the application, and our duty upon it appears to be plain and imperative. The first consideration is, whether the order of sessions which the Crown desires to remove into this court is a proceeding of that nature that we can properly examine it here, in order to determine its legality. If it be of that nature, then it is clear that upon the motion of the *Attorney-General*, it ought to be removed, in order that its legality may be discussed and settled. The cases upon this head

(a) Draper had, on a former day, moved for the *certiorari* on behalf of private persons, and produced affidavits setting out the facts of the case at length. But the court denied the application as being made too late, and without the proper notice having been given to the magistrates.

convince us that the order is one that is examinable here. There is indeed a case in *Caldecot*, 309, in which Mr. *Justice Buller* expresses himself in a manner that would lead us to doubt whether in his opinion an order such as the present could be removed by *certiorari*, but the note of the case is short and unsatisfactory; the decision does not stand upon the footing of a solemn adjudication of the court upon the question; and if it did it is quite irreconcilable with other cases decided after solemn argument, and in which the judgment of Mr. *Justice Buller* is entirely at variance with the opinion ascribed to him in the note of the case in *Caldecot*. Upon the authority of the cases in 1 *Salk*. 146; 1 *Ld. Raym.* 580; 1 *Str.* 391; *Burr.* 2458; 5 *T. R.* 279; *Doug.* 116; 4 *T. R.* 591; and others,—we have no doubt that this is a case in which, upon general principles, a *certiorari* may be awarded. Then, as to the want of six days' notice of application, and the lapse of six months after making the order—in any other case than upon an application by the *Attorney-General* on the part of the Crown, the *certiorari* must be withheld on both these grounds; but it is clear that these restrictions do not bind the Crown. Besides the well known general rule of law in this respect, in the case in 1 *Ea.* 304, there is an express authority cited to the effect, at the end of the case.

We abstain at present from all remark upon the legality of the order, or the proceedings of the justices, reserving the consideration of that question until both parties are before us. The time that has elapsed since the order was made, and the much greater inconvenience that may ensue from an inter-

ference in this stage than upon an earlier application, would have presented great obstacles if the matter were before us on another footing; but these considerations rest with the Crown, who thus interferes by its officer, and not with the court.

Certiorari granted.

DICKSON V. CROOKS.

Postage on a letter carried by inland navigation, from one post town to another, must be charged according to the distance the letter is actually carried, and not according to the distance by the post road between the two places.

ASSUMPSIT for money had and received brought against the defendant as deputy postmaster for the town of Niagara. A verdict was taken by consent for the plaintiff for 7d., subject to the opinion of the court upon points reserved. The facts of the case were in substance as follows:—York and Niagara are two post towns in this province, situate upon opposite sides of lake Ontario. There is a public road between the two places leading round the head of the lake which is practicable at all times, and by which road the mail is sent regularly throughout the year, the distance according to the mail route being 110 miles. By water the distance between the two places is only 35 miles, and except during the winter months, when the navigation is closed, there are schooners and steamboats passing and repassing, and among them a steamboat called the Canada, on board which is a box for letters, kept and placed by order of the Postmaster-General, who has directed his deputies and the defendant in particular to make that arrangement. Letters put into the post office

at either place directed to the other would according to the ordinary course of the post be sent by land and not by the boat; the latter mode of conveyance being an accommodation offered to such persons as choose to take advantage of it by placing their letters in the box kept in the boat, which letters on the arrival of the steamboat are taken to the post office, and from thence distributed in the same manner as if they had been conveyed by the ordinary land route. The captain of the steamboat is paid by the deputy postmaster at the rate of 2d. for each letter conveyed by him and delivered into the office upon his arrival. The Postmaster-General has directed the same rate of postage to be charged upon letters so conveyed as if they had been carried by the post on the land route between the two places; the difference of the distance, one route being 35 miles and the other 110, was admitted. A correspondent of the plaintiff being aware of all these facts, put into the box on board of the steamboat Canada at York a single letter directed to the plaintiff at Niagara; he did not take it to the post office at York, but took it himself to the boat. The plaintiff received this letter from the post office at Niagara, and a charge of 7d. being exacted upon it he paid it to the defendant; but contending that such a charge is illegal, he brought this action to recover it back, and a verdict was rendered for him by consent, with 7d. damages, subject to the opinion of the court upon the question whether the defendant as a deputy postmaster had a right to exact the same rate upon a letter conveyed in the manner described by the steamboat from York to Niagara as upon a letter conveyed by post on the land road. If he

had that right, then the verdict to be entered for defendant.

If the defendant had not a right to charge the same rate, but might legally charge a rate proportioned to the distance of thirty-five miles, according to the general scale of charge prescribed by law, then the plaintiff to be at liberty to enter a judgment for $2\frac{1}{2}$ d. damages.

If the defendant had not a right to make any charge of postage upon a letter so conveyed, then verdict to be for plaintiff with 7d. damages.

This case was argued in Hilary Term last by the *Solicitor-General* for the plaintiff, and the *Attorney-General* for the defendant—and the opinion of the court was delivered this term by the

CHIEF-JUSTICE.—This is a case of some importance, as it involves a question of very general interest. We do not think it necessary to enter particularly into many considerations which may be very reasonably urged on the part of the post office department, or to examine the deductions that may be drawn from them, because in our view of the case, the question lies in a narrow compass, and we do not consider ourselves at liberty to enter into any other consideration than the right to impose the rate which has been acknowledged in this case to have been exacted. The English adjudged cases upon points relating to the post office are not numerous. Those in Cowp. 182, 754, 3 Wils. 433, and Burr. 2149, 2709, and 2711, are the principal. They do

not meet the circumstances of this case, but they are nevertheless decisive of the present question; because they recognise the application to this particular department of the public service of a general principle of law, which we are of opinion must govern in this and in all similar cases, which principle is, that clear legal authority must be shown for a rate exacted from the subject, the rate being in the nature of a public imposition, and professedly demanded under public authority for public purposes. We are therefore to enquire whether the charge made in this case of 7d. for the conveyance of a letter 35 miles be warranted by any of the acts of parliament relating to the post office. If it be, there is no longer a question as to the right to exact it. If it be not, then we think it can stand on no other foundation, and the defence must necessarily fail, because, in the first place, we cannot look upon this question as raised upon a contract expressed or implied, between the parties as individuals; and, in the next place, it is not pretended that a regulation inconsistent with the acts of parliament either has been made or could have been made by any other authority. We have carefully examined the various acts relating to the post office, and we find no provision that in our opinion can be made to sustain the charge. Except for the purpose of illustrating the intention of some of the clauses of 9 Ann, c. 10, and 5 Geo. III., c. 25, no other statute need, we think, be resorted to in order to ascertain the authority for this charge. The most material general regulations respecting the post office still exist in the statute 9 Ann, and the scale of charge for the colonies which that statute prescribed having been

superseded by the scale established by the 5 Geo. III., those two statutes taken together exhibit the footing upon which the department now rests in this colony. (The provisions of various British statutes were here examined and commented upon by the Chief Justice.)

For the inland conveyance of letters no rate of charge can be found in the statutes except such as is proportioned to the distance along which the letter is conveyed. Other rates of postage, not modelled by distance, are prescribed by various statutes, but these are expressly for the conveyance of letters by sea, and in every instance the rates are decidedly less than those which are imposed according to the distance upon the post roads by land. Besides the general provisions on this head in the 2d sec., 5 Geo. III. the 9th sec., 9 Anne, c. 10, 7 Geo. III., c. 50, 27 Geo. III., c. 9, contain authority for charges on letters sent by sea; and the 39 Geo. III., c. 76, is a statute passed for the general regulation of postage on letters conveyed in vessels not being post-office packets, the provisions of which, as well as of the others, seem to us utterly inconsistent with the supposition that in this case of a short transit by water between two post towns the rate of 7d. can be legally imposed.

We do not find in the several statutes which we have examined that a discretion is vested in the Postmaster-General, or his deputies, to frame a rate of charge between two post towns upon any equitable considerations of circumstances. In the absence of any express legislative provision to the contrary

the actual port of the letter determines the charge. The discretion allowed in some cases by 41 Geo. III., c. 7, sec. 5, is for a different purpose and under different circumstances.

On the whole, we think it clear that a letter conveyed by the post from one post town to another in this province must necessarily be considered as having been conveyed by sea or by inland conveyance. We do not consider it as having been carried by sea although it has been conveyed by water, and if we did so consider it we should then be compelled to decide that the rate would be limited to 4d. by the 5th Geo. III. We regard it as having been carried by inland conveyance, and we consider that the rate is limited by the distance the letter has been carried; that distance is admitted in this case to have been thirty-five miles, and it therefore becomes unnecessary to consider the necessity of applying the criterion of actual measurement which Parliament may be thought to have indiscriminately required to be applied when the distance is in question. Whether even a rate proportioned to the distance may be imposed was another question made at the trial, and we have thought it necessary to give consideration to that point also, because it was contended that the letter, not having been put in the post office in the ordinary manner, no rate whatever could be legally exacted. We have not arrived at that conclusion, because we find it in several statutes contemplated that collections of letters may be made by the Postmaster-General and his deputies to be sent by vessels not belonging to the post office; and because we find it nowhere enacted that letters shall be taken

to the post office in the first instance. It is admitted in this case that the Postmaster-General pays a certain charge for conveying the letters; he therefore procures them to be carried, and ultimately they are received and distributed by him or his deputy; and a responsibility unquestionably rests with the department from the time the letters are deposited in the box.

Whatever, therefore, be the legal charge for carrying a letter thirty-five miles by inland conveyance in this colony, that rate, and not more, we all think, ought to have been exacted in this case; and for the excess that has been charged the plaintiff in this cause may enter up judgment. (a)

Per Curiam.—Judgment for the plaintiff.

DOE ON THE DEMISE OF MCFARLANE V. LINDSAY.

The certificate of a commissioner for administering the oath of allegiance is evidence after his death, and that of the party taking it, to prove it administered, as part of the transaction of a public officer in the execution of his duty. The 1st section of the Naturalization Act confirms the titles to real estates of such persons who had taken the oath of allegiance and died before the passing of the law, so as to enable their grantees as well as their children to hold any real estate derived from them.

EJECTMENT.—At the trial a verdict was rendered for the plaintiff, with leave to defendant to move to set it aside and enter a nonsuit on the following points—1st. That it was not proved that John Gardiner, under whom the lessor of the plaintiff claimed, and John Gardiner, who took the oath of allegiance,

(a) According to the cases cited, to which may be added *Jones v. Walker*, Cowp. 624; *Barnes v. Foley*, 1 W. Bl. 643, and *Rowning v. Goodchild*, 2 W. Bl. 906, a postmaster is bound to deliver all letters to the several inhabitants within a post town or place, at their respective places of abode, at the rate of postage only as established by Act of Parliament.

as proved, were the same persons. 2d. If the identity were established there is no proof that the oath was administered by one having authority. 3d. If the oath were administered by one having due authority the provincial statute of naturalization does not extend to legalise the claim of the lessor of the plaintiff holding under the deed proved, Gardiner having died before the passing of the act. The lessor of the plaintiff claimed under a deed of bargain and sale from John Gardiner, who was alleged to be the heir at law of one Richard Duncan, deceased. Richard Duncan held the premises under a grant from the Crown, and John Gardiner was in the peaceable possession of them when he conveyed to the plaintiff. John Gardiner was admitted to have been a citizen of the United States and an alien when he first came into the province, about ten years ago—but it was alleged he took the oath of allegiance about eight years ago before Solomon Jones, a commissioner for administering the same in the district of Johnstown. It was further admitted and proved that Solomon Jones and John Gardiner had both been dead for several years before the action was brought.

In Michaelmas Term last *Bidwell* shewed cause to a rule *nisi*, obtained by the Attorney-General, to set aside the verdict and enter a nonsuit. He urged, on the first point, that as there was good evidence to go to a jury of John Gardiner's identity, by shewing that he lived in the same neighbourhood with Solomon Jones, the commissioner, and as it was not proved that any other John Gardiner resided in that neighbourhood, the finding of the jury rendered any

further discussion on that head unnecessary. On the 2nd, It was proved that Solomon Jones acted both as a commissioner as well as a justice of the peace for several years. This is good evidence of authority as between third parties, and where their interests only are at stake. It raises a sufficient legal presumption to warrant the finding of the jury. 3d. It was proved that Gardiner lived in this province when the oath of allegiance was taken by him, and remained a resident till his death. This case is clearly included in the third description, contained in the first clause of the Naturalization Act. The benefit given to the children and other descendants of such persons forcibly points out this as the true construction. This is a remedial statute, and should consequently receive a liberal construction.

Solicitor-General, contra.—The statute is not remedial. It confers new privileges, and must be construed strictly—Bac. abr., Title Statute. The fact proved, that a certificate, signed by S. Jones, of his having administered the oath of allegiance to John Gardiner, was found among the papers of Gardiner, under whom the lessor of the plaintiff claims, amounts to nothing—for the certificate is no evidence that the oath was administered—1 Star. Ev. 105, 294; 2 Star. Ev. 362; Doug. 173. Where an oath is referred to as taken, the oath itself, or a copy at least, must be produced. And the death of S. Jones cannot alter the question; for he neither had nor could have had power to administer it. The statutes, which give the power of administering the oath of allegiance to aliens, do not authorise any delegation of that authority to commissioners. By the 13 Geo. II.,

c. 7; 20 Geo. II., c. 44; and 30 Geo. III., c. 27, the Chief, or other Judge, Governor, Lieutenant-Governor, or Chief Magistrate of the place where the party seeks the benefit of the act, may administer this oath, and to them the power is confined. As to the 3rd point, it is only necessary to compare the 1st and 15th clauses of the Naturalization Act to see that persons who died before it passed are not within its purview.

SHERWOOD, J., this day delivered his opinion—(after stating the case.)—It was left to the jury on the evidence to determine whether the John Gardiner of Williamsburgh was in truth the same John Gardiner whose name appeared in the commissioner's certificate. They have found he was—and I think their finding is conclusive on the first point.

As to the 2nd point, it appears by Stokes' view of the constitution of the British Colonies in North America and the West Indies, 149, that in every provincial establishment, or King's government, the Governor is the representative of the King. He also gives the form of a commission to the Governor of a province, in which appears an authority to appoint fit persons to administer the oaths mentioned in the 1st Geo. I., c. 13; among which is the oath of allegiance, and I have no reason to suppose that the King's commission to his Governors of provinces has been materially altered, in point of power or form, since that period. That the Governor or Lieutenant-Governor has ample power and sufficient authority to appoint persons to administer the oath of allegiance within this province I have not the least doubt; and

I believe the legal proposition is too clear to admit of argument. Without alluding to the terms of his commission, I think, as the representative of the King, he possesses this power, and I have no reason to think his commission qualifies the power. Taking it for granted, therefore, that the Governor has the power of appointment, I proceed to the principal part of the question, viz :—whether the commissioner had due authority. It was proved at the trial that Solomon Jones acted as a commissioner for administering the oath of allegiance, and as a justice of the peace, in the district of Johnstown, for many years before this action was brought, and no evidence was adduced by the defendant to show that he was not legally authorised to fill either of the situations. Now the general rule of law applicable to the acts of public officers is this, “*omnia presumantur esse rite et solemniter acta donec probetur in contrarium* ;” and the principle is fully recognised in the following cases, as well as in many others :—4 T. R. 366 ; 1 Leach. 66, 515. I am therefore of opinion, that as there was no evidence against the legal presumption raised by the acts of Solomon Jones as commissioner, he must be taken to have acted in that capacity under a legal appointment, so far as relates to the present action.

At the trial of the case an objection was taken by the counsel, respecting which I entertained much doubt, and although the objection was not contained in any of the points reserved, it was again made in the course of the argument in bank, and is quite worthy of consideration. The counsel for the defendant alleged on both occasions that the certificate, which was proved to have been wholly in the hand-

writing of Solomon Jones was only hear-say testimony, and could not come within any exception to the general rule of law, that mere hear-say evidence is not admissible when unsupported by other testimony, which might be considered sufficient to lay a foundation for its reception. If this be a valid exception, then there is no legal proof that John Gardiner took the oath of allegiance, and it therefore becomes necessary to examine what weight the objection in reality possesses. The statute of this province, commonly called the Naturalization Act, and assented to by the King in council, requires by its first section that the descriptions of persons therein mentioned should be proved to have taken the oath of allegiance before a person duly authorised before they should be deemed to have been natural-born subjects of the King. John Gardiner was a person of that description. The statute does not require the oath of allegiance to be subscribed by these persons; the taking of it is sufficient, unless there be some other law to make the subscribing of it necessary. By the 1st Geo. I., c. 13, all persons holding offices, except parish offices, are bound to take and subscribe the oaths mentioned in that act, among which is the oath of allegiance. But I am not aware of any law requiring private individuals holding no office to take and subscribe the oath of allegiance at any time, unless they be specially required to do so by some authorised officer. John Gardiner was not required to take the oath. He did it voluntarily and with a view to his own interest or convenience, and not for the performance of a mere public duty. In my opinion he took the oath precisely in the same manner, and with the same intention of gain, with which applicants

to the executive government for land are in the habit of taking the oath of allegiance. It is a matter of public notoriety that for more than thirty-six years last past almost all persons applying for granting of the waste lands of the Crown have taken the oath of allegiance without subscribing it before a single justice out of sessions, or before the chairman of the quarter sessions, who have as constantly given a certificate of the oath having been administered to the person taking it, and who have in no instance made any registry or entry of the transaction to be kept by themselves. The very form of the certificate is sufficient to prove that it must be given with the intention of allowing the person who receives it to keep it in his own possession till the occasion which induced him to procure it renders it necessary to deliver over the instrument to some other person. It has been the usage of this province, for the length of time already stated, for magistrates and commissioners to administer the oath of allegiance upon the request of private persons applying for land without keeping any registry or note of the transaction, and without requiring the applicant to subscribe it. The legislature must be supposed to have been cognizant of this usage when they passed the act, and their enactments are so much in accordance with it that I must think they had it in view when the law was made. And, indeed, when we examine into the principle of the thing, I think no good reason can be given why a voluntary oath of allegiance, taken before a person duly authorised to administer it, should not be binding on the person who chooses to take it, whether it be in writing or not, and if it be binding, why it should not be capable of proof?

I think the Naturalization Act does not require that the persons mentioned in the 1st section should prove their having both taken and subscribed the oath of allegiance to entitle them to claim the privileges therein mentioned; proof of the taking of the oath is all the law demands, and beyond that it appears to me no court would be justified in requiring proof. The only question remaining, therefore, is whether it was legally proved at the trial that John Gardiner did take the oath of allegiance. It appeared in evidence that at the time the commissioner administered the oath of allegiance to Gardiner he made out a certificate stating that fact, and signed it officially. This certificate was found among Gardiner's papers after his decease, and I think it must be presumed from the circumstance that the commissioner delivered the certificate to him for the purpose of making use of it when occasion should require. There was no proof, nor even allegation, that Solomon Jones, or any other commissioner in the province, kept a registry or entry of the names of persons who took the oath of allegiance before him, and as no law required him to keep such entry, except where he administered the oath to public officers, no legal presumption would be raised that he did keep any. It appears that the commissioner followed the general usage in the country, and gave a certificate of what he had done. Now, it appears to me that this written memorandum may be fairly considered as part of the "*res gesta*" of a public officer, in the execution of his public duty, and as the memorandum was not a copy of any entry, but was the original note in writing made by the commissioner of the whole transaction be-

fore him, I think it was good evidence after the death of Solomon Jones, although it was not by law strictly his duty to make it. I think there are many cases in which the ruling of the judge at *nisi prius* as well as decisions of the court in bank will support the opinion that I now advance, but I shall not stop to mention any but the following:—as the certificate or note in writing was made by an authorised officer upon a subject clearly within the scope of his official duty, I am inclined to think it comes within the principle in 3 Camp. 268, which was an action on the case for disturbing the plaintiff in the enjoyment of a pew in a church which he claimed in right of a house occupied by him in the parish. The plaintiff deduced his title to the house from Sir William Rawlinson, to whom it belonged in the year 1691, and offered in evidence an entry made by the churchwardens of that time stating that the aisle over the gallery had been repaired by Sir W. R. at his own costs and charges in consideration of his using the gallery or pew. It was contended by the counsel for the defendant that the entry of such facts could not be allowed in evidence to prove the facts. Lord *Ellenborough* said—“I think the entry is evidence in support of the plaintiff’s claims. It shows the reputation of the parish on the right; besides, it is made by the churchwardens upon a subject within the scope of their official authority.” It was not pretended that there was any statute or other law which made it the duty of the churchwardens to make the entry, or which made the entry itself evidence at any time. In 1 Leach. Crown Cases 24, the muster books transmitted by the officers of the ship to the navy office were allowed

to be read in evidence. In 1 Esp. N. P. C. 427, where the action was brought on a policy of insurance to recover an average loss on goods shipped on board the ship *Nereid*, from Leghorn to London, warranted to sail with convoy, it became necessary for the defendant to prove the time of the sailing of the convoy from Gibraltar. It appeared by the evidence of the plaintiff that the captain of the *Nereid* had put himself at Gibraltar under the convoy of the ship *America*, and Chief Justice *Eyre* allowed the log-book of that ship to be read in evidence for the purpose of proving the time the convoy sailed from Gibraltar. In 3 B. & P. 188, the same kind of evidence was admitted, and upon the same principle. That was an action brought by the plaintiff, as assignee of a bankrupt, upon two bills of exchange, and it became necessary to prove that the bankrupt had committed an act of bankruptcy by lying two months in prison for debt. The books of the Fleet and King's Bench were produced and allowed to be read to prove that fact upon the authority of the case in Leach. Cr. Ca. 435, in which entries in the book kept at Newgate were permitted to be read. Lord *Alvanley*, C. J., recognised the authority of the latter case, and said, "That was a book kept by a public officer for the purpose of entering the transactions of the prison, the names of the prisoners, and the time of their discharge, which entries were sometimes made from the information of the turnkeys and sometimes from their endorsements on the warrants." In another place he says, "It was not contended they were that sort of public document a copy of which might be given in evidence, like a parish register made under public

authority." I think it material also to remark that there is nothing in any of the foregoing cases to shew that the facts proved by those entries could not have been proved by witnesses who knew them, or that such witnesses were dead or absent from the kingdom at the time of the trials. The last of this class of cases which I shall mention at this time is *Lloyd v. Wooddall*, 1 Black. 29. Wooddall was a sergeant in the guards, and was arrested at the suit of the plaintiff for a less debt than was allowed by the Annual Meeting Act to warrant the arrest of a soldier. It was insisted by the counsel for the defendant that a non-commissioned officer was equally privileged as a common soldier, and it became necessary to shew the nature of the defendant's station in the regiment. The Secretary at War sent a certificate to the court stating the nature of a sergeant's station. The plaintiff's counsel contended that the certificate was no evidence; but the court ultimately determined that it was evidence, and allowed it to be read as such. This case was determined by the Court of King's Bench in England, and its authority is admitted in all treatises on evidence. Upon the principle established in the foregoing cases it seems to me the certificate of the commissioner Solomon Jones was after his death properly admitted to be read in evidence in this case, upon the ground that it formed part of the transactions of a public officer in the execution of his duty, and was the best evidence the nature of the case would admit.

As to the third point—the Naturalization Act is, in every sense of the term, a remedial law, and in my opinion does either mediately or immediately

affect the interest of a great portion of the population of the province. It is a law which justice and equity as well as sound policy required; and it is of that description of statutes which the common law allows to receive an equitable construction for the purpose of attaining those objects which the legislature had in view when they made the law. In the case of a remedial statute everything is to be done in the advancement of the remedy that can be given consistently with any construction which can properly be put upon the act; and the construction of such statutes is extended to other cases within the reason or the rule of them—1 Cowp. 391. Lord *Coke*, in his 1st Inst. 246, makes the following remarks on this subject, and quotes as his authority for making a part of them:—Bract. lib. 4, fol. 186—“The equity of a statute is a construction made by the judges that cases out of the letter of a statute, yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth, and the reason hereof is, for that the law-makers cannot possibly set down all cases in express terms.” “*Æquitas est convenientia rerum quæ cuncta coæqui parat, et quæ in paribùs rationibus paria jura et judicia desiderat.*” “The statute of Gloucester” (he says in 54 b), “which giveth the action for waste against the lessee for life or years (which lay not against them at the common law), speaketh of one that holdeth for a term of years in the plural number, and yet it appeareth by the authority of Littleton (sec. 67), although it be a penal law, whereby treble damages and the place wasted be recovered, yet a tenant for half a year, being within the same remedy, although

it be out of the letter of the law, for '*qui hæret in littera hæret in cortice*,' which is an excellent example whereupon a man may in many like cases settle a certain judgment." The intention of the legislature is the best method to construe the law even in penal laws, 8 Mod. 65. The preamble is a good means for collecting the intent.—Com. Dig. title Parliament R. 11. I have made these few quotations from the great mass of authorities which may be found in the books upon the same subject, to shew that a remedial law, under which denomination I have already said the Naturalization Act comes, should receive a liberal construction, in order to carry into the fullest effect the intention of the law-makers, and I will now proceed to the examination of the statute. The preamble is in the following words:—"Whereas it is expedient to remove by law doubts that may have arisen as to the civil rights and titles to real estates of some of the persons hereinafter mentioned, and to provide by some general law for the naturalization of such persons not being by law entitled to be regarded as natural-born British subjects of His Majesty as are actually domiciled in this province." It is evident, because the legislature say so, that they intended amongst other things "to remove doubts as to the titles to real estates" of some of the persons mentioned in the act. Now there are two classes of individuals alluded to in the first and second sections of the act. The first class, as stated in the first section, embraces the following descriptions:—All persons who had received grants of lands from the Crown; all persons who had held any public office in the province under the authority of the executive government; all persons who had

taken the oath of allegiance before any one duly authorised to administer the same; and all persons who had their settled place of abode in this province before the year 1820, and were resident in the same when the law was made. The second class, as mentioned in the second section, includes all persons domiciled in this province on the 1st of March 1828 (not being of any description of persons mentioned in the first section) who have resided or shall continue to reside seven years in this province or in some other part of the King's dominions. After enumerating the persons mentioned in the first section, the enactment of the legislature in that part of the act is in the following words, respecting all of them, and declares that they "shall be and are hereby admitted and confirmed in all the privileges of British birth, and shall be deemed, adjudged, and taken to be, and so far as respects their capacity at any time heretofore, to take, hold, possess, enjoy, claim, recover, convey, devise, impart, or transmit any real estate in His Majesty's dominions, or any right, title, privilege, or appurtenance thereto, or any interest therein, to have been natural-born subjects of His Majesty, to all intents and purposes whatsoever, as if they and every of them had been born in His Majesty's United Kingdom of Great Britain and Ireland; and that the children or more remote descendants of either of the foregoing descriptions who may be dead shall be and are hereby admitted to the same privileges which such parents or ancestors, if living, could claim under this act." The legislature further enact in the second section that the persons therein mentioned "shall be deemed, adjudged, and taken to be, and so far as respects

their capacity at any time heretofore to take, hold, possess, enjoy, claim, recover, convey, devise, impart, or transmit any real estate in this province, or any right, title, privilege, or appurtenance thereto, or any interest therein, to *have been* natural-born subjects of His Majesty, to all intents, constructions, and purposes whatsoever, as if they and every of them had been born within this province"—with a proviso that the persons mentioned in the second section shall reside seven years in this province, and take the oath of allegiance (except females) within three years after attaining the age of sixteen years. It appears to me the legislature had two objects in view with respect to the persons alluded to in the first section of the act who had taken the oath of allegiance before the passing of the act. The first was to make such of them as were alive when the law passed natural-born subjects, and to be deemed and adjudged as such from the day of their birth, to all intents, constructions, and purposes whatsoever as if they had been born in Great Britain or Ireland. Whoever reads this section with attention, I think will readily admit that it is decidedly retrospective in its provisions, and that all those who were alive when the law passed, and had taken the oath, were in the eye of the law really and truly natural-born subjects; for I take it for granted no one doubts the power of the legislature to produce this effect. The legislature may do anything that regards legislation which is not altogether impossible from the nature of our constitution. This certainly is not. After the legislature had made natural-born British subjects of such persons as were alive when the act passed, and they were in consideration and

judgment of law to be taken to have been born in Great Britain and Ireland, just as if they had in fact been born there, nothing further was necessary to be done for them; they always had a right to hold real estates, and their titles were free from the objection of alienation, and so were the titles of those who had purchased from them or acquired any real estate from them by other legal means. There was no necessity for the legislature therefore to go any further for the benefit of those people who were alive than the making of them natural-born subjects from the day of their birth. Still, they have gone further in my opinion, and I will endeavour to shew that the reason for so doing was to confirm the titles to real estates of those who had taken the oath of allegiance and were supposed to be dead at the passing of the law, that their children might have their just rights, and that honest purchasers might not be defrauded. These, it must be admitted, were objects worthy of a legislature who wished to promote the peace, welfare, and happiness of the province. To settle and confirm the title to real estates of men who came into the province with the intention of becoming British subjects, who had resided long in the country, and who had in the most solemn manner manifested their determination to become members of the great family of Britain, by taking the oath of allegiance to her Sovereign, and by joining themselves to the number of his subjects, was a moral, political, and public duty. Justice as well as policy required the measure. To attain this object completely it was equally necessary and proper to confirm the titles to real estates of such men who were dead as of

those who were living. The community at large were alike interested in both, because the titles of heirs and purchasers, in proportion to their numbers, were as much concerned in the one case as in the other. The legislature clearly prove by their own words that it was their intention to confirm and make valid the titles of all the descriptions of persons mentioned in the first section of the act who had taken the oath of allegiance, without discriminating between those who were dead [and those who were living, and without regard to the time their estates were acquired. They certainly were not unmindful that some of the persons described in the first section might be dead, because they expressly recognise the possibility of such a contingency, and secure to their children the privileges of British subjects. The words of the statute which relate to the descendants of those who were dead are the following:—"And that the children and more remote descendants of any person or persons of either of the foregoing descriptions who may be dead, shall be and are hereby admitted to the same privileges which such parents or ancestors if living could claim under this act." The thirteenth section of the act is in the following words, and relates exclusively to the persons mentioned in the second section—"That if any person not entitled to be regarded as a natural-born subject of His Majesty, who at the time of the passing of this act was domiciled in this province, shall die before the period limited by this act for his taking the oath according to the provisions thereof, such person shall be nevertheless deemed to have been a natural-born subject of His Majesty so far as regards the taking, holding, im-

parting and transferring of any real estate by grant, marriage, dower, or inheritance." Now, unless the legislature designed to confer greater privileges on the persons mentioned in the second section of the act who should never take the oath of allegiance than they wished to secure to the persons mentioned in the first section of the act who had actually taken the oath, I think it quite clear they intended to confirm the titles to real estates of the latter as fully at least as of the former. It would be unjust to suppose the legislature would give a preference to the undeserving class; and in my opinion the whole tenor of the law goes to prove the reverse of the proposition, and to show their unvaried solicitude to secure to every one of the persons mentioned in the first section who had taken the oath the full enjoyment, by themselves, their children or grantees, of all their real estates, unaccompanied with any doubt of the validity of their titles. The obvious meaning of the expressions in the preamble of the act—"To remove doubts as to the titles to real estates of some of the persons hereinafter mentioned," is to show an intention of confirming all such titles as the act manifestly admits to be just and necessary to confirm. Could anything be more just and necessary than the confirmation of the titles of men who had taken the oath, and who had lived and died in the province? But it may be said that the act does confirm the titles of such men by admitting their children to the same privileges which their parents if living could claim under the law. The children, it may be asserted, can inherit, but grantees from the parents cannot hold. If the parents are considered to have been natural-born subjects so far as relates

to the holding and transmitting real estates, as I think they must be according to the words of the act, then both children and grantees can hold their estates, but if they are not considered to have been natural-born subjects to the extent before mentioned then neither children nor grantees, in my opinion, can hold their real property. It therefore becomes necessary to enquire what privileges such parents could claim if living so far as relates to real estates. The legislature have said they should have the capacity of "taking, holding, possessing, enjoying, recovering," &c., any real estate in the same manner as if they had been natural-born subjects of His Majesty. Then the question arises—Can a natural born subject inherit to an alien? The law of England on this question may be read in Co. Lit. 2 B., and in Plowd. 229, to the same effect—"If an alien purchase lands to him and his heirs, albeit he can have no heirs, yet he is of capacity to take a fee simple but not to hold; for upon office found the King shall have it by his prerogative of whomsoever the land is holden. So it is if the alien do purchase land and die, the law doth cast the freehold and inheritance upon the King." It appears, therefore, if an alien die holding real estates the King immediately takes his land without office found, or, in other words, the freehold by act of law becomes vested in the King. The statute declares the children shall be admitted to the same privileges which the parents could claim under that act. The parents if living could not claim to inherit to aliens, consequently their children cannot inherit to them if they were aliens; and unless the act made them natural-born subjects when living, it is not denied

they were aliens. If indeed the parents are not to be deemed and taken to have been natural-born subjects so far as respects the holding of real estates, then the inconvenience in society will be almost incalculable. It may be said, however, that an argument drawn altogether *ab inconvenienti* is by no means conclusive, and this I readily admit; but still such arguments are allowable to assist in determining the true balance of the scale when the law is not perfectly clear and explicit in its language. In the 1st Inst. this kind of argument is noticed. The text is as follows:—“*Argumentum ab inconvenienti est validum in lege quia lex non permittit aliquod inconveniens.*” And the law that is the perfection of reason cannot suffer anything inconvenient. It is better, saith the law, to suffer a mischief that is peculiar to one than an inconvenience that may prejudice many. When the words of an Act of Parliament are plain and clear so as to admit of no doubt, convenience or inconvenience is out of the question, because the court must be governed by the principle of the law, and not by the hardship of any particular case; but the act now under consideration is not perfectly plain and clear, and therefore the last quotation may properly be applied to the present case so far as it may be deemed consistent with known principles. If the persons described in the first and most important section of the Naturalization Act who had taken the oath of allegiance and were dead when the act passed, are not considered to have been natural-born subjects to any purposes whatever, the children, as I before said, cannot inherit. The law, as I think, is not so, but confirms the titles of the parents in the manner I have before

stated. This is the conclusion at which I arrive from a consideration of the following particulars:—The words, tenor, and scope of the whole act taken together—the intention of the legislature, manifested by the justice and equity of their apparent inducements in making the law—and the public inconvenience and hardship inevitable from the construction contended for by the defendant. This act, in my opinion, should be allowed to have its course, and ought not to be interrupted by objections of trifling slips or doubtful ambiguities in its diction or arrangement of matter, and should receive an equitable and liberal construction, particularly on account of its being a remedial law. My opinion is, that the legislature, by the first section of the act, confirm the titles to real estates of all those persons who took the oath of allegiance and died before the making of the law, and that all such persons are to be deemed and adjudged to have been when living natural-born subjects of His Majesty so far as respects their capacity at any time before their death of holding, conveying, or transmitting real estates to the same extent as if they had been born in Great Britain or Ireland.

Chief Justice and Macaulay, J., gave no opinion.

Postea to the lessor of the Plaintiff.

MCNAB V. BIDWELL AND BALDWIN.

The House of Assembly in this province have a constitutional right to call persons before them for the purpose of obtaining information, and if the House adjudge the conduct of such persons, in answering or refusing to answer before a select committee. to be a contempt, they have the right of imprisoning them.

TRESPASS and false imprisonment against the Speaker and another member of the House of Assembly. The Speaker pleaded that he was a member of the House of Assembly in this province, and Speaker of that House at the time when, &c. That the Assembly being then in session it was by them resolved that the present plaintiff, "having refused to answer questions put to him by the select committee appointed to enquire into the Hamilton outrage, and the alleged threatened release of Francis Collins by force, with power to send for persons and papers, and otherwise misdemeaning himself before the said committee, had been guilty of a high contempt and breach of the privileges of the House of Assembly;" and that it was therefore further resolved and ordered by the said Assembly "that the Speaker should issue his warrant, directed to the Sergeant at Arms or his deputy, to apprehend the present plaintiff forthwith, and bring him to the bar of the said House on Monday then next to answer for such contempt and breach of privilege." That the defendant as Speaker did issue his warrant in pursuance of these resolutions, particularly reciting the proceedings of the Assembly on which it was grounded, and requiring the Sergeant at Arms to apprehend the plaintiff forthwith and bring him to the bar of the House of Assembly on a day therein named to answer for such contempt and breach of privilege. That upon this warrant the plaintiff was

apprehended and brought to the bar of the House of Assembly; that the resolutions of the Assembly were there read to him, and he having been heard in his defence before the said House of Assembly respecting his said contempt and breach of privilege, it was by the Assembly resolved and ordered that for his said contempt and breach of privilege he should be committed to the common gaol of the Home District during the pleasure of the House, and that the Speaker should issue his warrant to the Sergeant at Arms or his deputy, and to the sheriff or gaoler of the Home District, requiring the Sergeant at Arms to take the plaintiff to the said gaol, and the sheriff or gaoler to receive him and keep him in custody during the pleasure of the House. That the defendant as Speaker did, while the House was still in session, make his warrant in pursuance of this resolution, which warrant, before being signed by him, was read to and approved by the House—the warrant is then set out, containing a precise recital of the proceedings on which it is founded, and being exactly in accordance with the resolutions of the House. The defendant further states that upon that warrant the plaintiff was apprehended by the Sergeant at Arms and delivered into the custody of the sheriff of the Home District, who received him and detained him during the pleasure of the House of Assembly, from the 16th February to the 3rd March in the same year, in obedience to the resolution, order, and warrant last mentioned, and that during all the time mentioned the parliament was still sitting. The other defendant (Mr. Baldwin) pleaded specially relying on the same facts and privileges, and setting forth that he was a member

of the Assembly, and sitting and acting as such, and in that capacity assented to the resolutions ordering the warrants for the plaintiff's apprehension and commitment for contempt after plaintiff had been heard in his defence at the bar of the House and adjudged guilty of the contempt.

To these pleas the plaintiffs demurred generally.

This case was argued last term at great length, and very ably by the *Attorney-General* for the plaintiff, and *Rolph* for the defendants. The judgment of the court, however, embraces every matter of importance which was raised and discussed, and was this day given.

CHIEF JUSTICE.—As a mere legal question, the point in this case seems to me to be so free from difficulty that it is unnecessary to labour it, and I shall not consider it in its several branches with that minuteness which would be proper if I entertained doubts on the subject. Whether in any particular case that may be under discussion in the House of Assembly it may be expedient or just to dispose of it there, and those opinions may proceed upon considerations which the members of that body and they only can entertain. But whether the Assembly, as a branch of the legislature of this province, have power to commit for a contempt in a case like the present is altogether a different question, and when it comes for decision here it must be decided on strict legal principles, and wholly apart from all other considerations. The justification in this case would have been more strictly formal

if it had given to the legislature of this province, and to that branch of it whose powers are in question, the precise designations assigned by the British statutes which create them. The term "parliament," regarding merely the import of the word, may perhaps be correctly applied in reference to the nature and functions of our legislature, as *it is* certainly applied to councils of far inferior importance, and it is certain that the term has grown into use in this province, and has the direct sanction of many of the acts of our legislature, but it would have been more technically proper I think on such an occasion as the present to have preserved the precise names assigned to our legislature and its several branches in our written constitution—and in calling the resolutions of the Assembly, which is but one branch of the legislature, the resolutions of parliament, as is done in one of the special pleas, there is certainly an inaccuracy which would have been better avoided. The substantial defence, however, is before the court on this general demurrer, and it is upon general principles of the law and constitution that the question has been argued. If in consequence of a similar commitment by the House of Commons an action of trespass against the Speaker and a member of that House were depending in the Court of King's Bench in England, it cannot now be doubted for a moment that it would not and could not be sustained. Many authorities have settled that point conclusively, and whether the right to commit for such a contempt should be questioned upon the return of a *habeas corpus*, or as in the present case in an action of trespass, it is certain that the Court of King's Bench would disclaim the power either to

discharge the prisoner or to examine into the particulars of the alleged contempt with the view of affording the party a remedy by action for his imprisonment. They would decidedly hold that for a contempt offered to the House in session the offending party might be committed by order of the House. I cannot imagine that any distinction would be drawn between a contempt alleged to have been offered to a committee of the House or a contempt offered to the House in a body, and I am convinced that when the House had resolved that refusing to answer questions proposed by a committee was a contempt of the House and a breach of their privileges, the Court of King's Bench would not question the propriety of that decision. It is equally clear that no exception would be considered to lie to the warrant of the commitment on account of the general nature of the charge, "that the party had otherwise misdemeaned himself before the committee." On the contrary, the court would disclaim, as they have always disclaimed, the power of enquiry into the particulars of the contempt—*Ld. Raym.* 1105, 1 *Mod.* 158. They would therefore hold it needless to specify a matter into which they could not examine, and as the charge that the party had "otherwise misdemeaned himself before the committee of the House" might include contempt of a very flagrant description, they would rather think it reasonable to infer that some such contempt had been committed than to presume that the House of Commons had gravely imputed an offence where none existed. The cases in 3 *Wils.* 190, and 14 *Ea.* 1, are most explicit and conclusive upon these points, and the judgment of Mr. *J. Bailey* in the last case shews in

very clear and strong terms how contrary it would be thought in England to reason and to law that under such circumstances as are stated in this record the Speaker, who simply carried into effect the resolution of the House, and much more an individual member who merely voted upon it, should be held responsible as trespassers. It is unnecessary here to reason upon the decisions adverted to or the cases which are cited in them; they establish nothing new with respect to the doctrines of contempt, either as applied to the House of Commons or the courts of justice, but the elaborate judgments of the court, and particularly of Lord *Ellenborough*, in 14 Ea., are so full, and to my mind so satisfactory, that, notwithstanding the apparent danger of entrusting to any tribunal the power which is the subject of discussion in these cases, the arguments proving its necessity seem to me unanswerable in every point of view.

We are then driven to the question, whether there is in the jurisdiction and constitution of this court, or in the nature and powers of the House of Assembly in this province, a sufficient reason for concluding that in a case like the present a control which in England the Court of King's Bench cannot exercise over the acts of the House of Commons, ought to be exercised by this court over the House of Assembly. Perhaps in favour of personal liberty, and considering the right to its enjoyment as a natural right only to be abridged when the authority is manifest, the question ought rather to be reversed, and we should be held first to satisfy ourselves that the power exists to control this natural right. The terms of the question, however, are immaterial,

since the investigation must be the same. In a case then of contempt so clearly and directly alleged on the pleadings and resolved by the House, I cannot see upon what sound principle the power of the Assembly can be denied. If it were admitted that in England the authority of the House of Commons to commit has, when questioned, been sustained by the courts upon the ground of precedent and usage only, still it is material to consider that this usage must have had a beginning, and that in the first instance we must suppose the power to have been assumed and acquiesced in from a conviction that upon principle it might and ought to be exercised. Although the precise era at which the House of Commons began to exist as a separate branch of the great council of the nation is still a disputed point among historians and antiquaries, still a period is assigned by very general consent, which was long subsequent to the regular organisation of the great Common Law Court of the Kingdom, and they must therefore have begun to exercise this power at a time when there was a tribunal to control them, if such control could in the nature of things come within the jurisdiction of that tribunal. But the power of the House of Commons to commit for a contempt has not been taken to rest wholly or even mainly on the ground of precedent and immemorial usage, and upon the imagination, or fiction built upon it, that an act conferring such a power must be presumed to have been passed, though the record can no longer be found. If it did in England rest on this ground exclusively, then it seems to me that in order to vindicate the assumption of such an authority by the Assembly here it would be neces-

sary to rest the argument upon an adoption "of the laws of England as the rule of decision in all matters of controversy relative to property and civil rights," and to reason thus—By the law of England the House of Commons, as one branch of parliament, may commit for contempt; therefore, as we have adopted the law of England, the House of Assembly of Upper Canada, as part of the legislature of Upper Canada, may legally exercise the same powers without reference to the principles upon which such powers are assumed. I am not prepared to say that upon that footing the argument can be maintained, and most of the objections that in this case were very forcibly urged against the existence of the authority have appeared to me to be applicable only upon the supposition that it is endeavoured to be maintained simply upon the fact that we have adopted the laws of England. But the question is to be taken up on broader grounds, and I think upon the most convincing authority. In 14 Ea. Ld. *Ellenborough* expressly declares his opinion, "That independently of any precedents or recognised practice on the subject, such a body as the House of Commons must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument that the House of Commons must be and is authorised to remove any immediate obstructions of its own proceedings." Then if, *a priori* and independently of precedents, such a body as the House of Commons must be armed with an authority to commit for contempts, and thereby to remove any immediate

obstructions to its proceedings, I think the same power for the same reasons must be admitted to reside in the House of Assembly here; for that Assembly represents all the people in this province; it has, in conjunction with the other branches of the legislature, power to bind the lives, liberties, and estates of all the inhabitants of this country.

Although the legislature of this colony is subordinate to the imperial parliament, it is the supreme power acting in this province; its legislative authority extends to the most important objects, and the instances in which it is restrained are, perhaps, not those of the greatest and most immediate consequence to the welfare of society. If a legislative body with such powers, and established for such purposes, had not also the power of giving effect to their consultations by protecting themselves from insults, and removing obstructions from their proceedings, I am not certain that more injury than good might not be found to result from the constitution conferred upon us, and I cannot satisfy myself upon any reasoning that it is not as important for us as the people of England that our legislature should not be compelled to make laws in the dark, and that they should have power to enquire before they come to decide. When it is considered that this particular branch of the legislature is elective, and that the nature of its functions is such as occasionally and inevitably to raise up against its proceedings much excitement and opposition, and often much prejudice from various causes, it is obvious that it would soon become utterly helpless and contemptible if it had not the power of deterring persons from menace,

defiance, and insult, by the exertion of such authority as is confided in all countries under our constitution to the common courts. If once, then, it be established that they may in such cases commit for contempt, then the law relating to all commitments for contempts necessarily applies, and according to a series of authorities necessarily restrains us from interfering in the present instance.

It has been contended that the contempt which is particularly specified, namely, the refusing to answer certain questions put by a select committee appointed to enquire into the Hamilton outrage, and the alleged threatened release of Francis Collins by ^{an} force, could have been no contempt, inasmuch as the Assembly not having criminal jurisdiction or power to try or to enquire, were exercising functions that did not belong to them. Neither the premises nor the inference can, I think, be admitted. How can we possibly know that the outrage spoken of may not be conceived to have implicated the character of one of their own members so deeply that for the honour of the House it was necessary to relieve him from suspicion or to expel him as unworthy. Again, the outrage and the threatened violence spoken of may have been of a nature so serious as to demand strong legislative measures, and surely it would be a very imperfect constitution that should furnish those who have to act in such emergencies with no authority to acquire the necessary information. There is no occasion for examining here into the means of conducting an impeachment in this province; but suppose for a moment that no such means exist, if the united representatives cannot therefore bring a great public offen-

der to justice in this province, there would seem to be very urgent occasion for their representing to the King or to the imperial parliament the necessity of a remedy from another quarter. In making such representations the assembly could not be said to be arrogating a criminal jurisdiction; and if it be admitted that such representations are within the scope of their functions, which all usage would shew them to be, then there is certainly a rational object for enquiry, and a necessity for a power to punish such contempts as would obstruct its exercise. We cannot divine, and we ought not to presume to conjecture, the specific object of such enquiry, much less can we entertain and act upon the presumption that because such a power might be abused it was therefore in this case intended to abuse it. It is said that courts newly created cannot prescribe, and can therefore have no other power than is expressed in their charter. The courts of Oyer and Terminer and General Quarter Sessions in this province have their power defined by no act of our legislature, and yet I doubt not that upon the principle of reason and necessity they must be allowed powers to preserve and enforce their authority.

Without discussing further the objections that have been or may be raised, I am on the whole of opinion that this action cannot be supported. I do not say that because the British House of Commons has the power, therefore under our adoption of the law of England the same power is vested in the House of Assembly as a body perfectly similar; but I consider the question in this way:—the fact that the House of Commons assumes and exercises the right shews that

it is felt to be necessary in order to enable them to discharge their duties. I think the same necessity exists here, and from principle the same consequence in my opinion must follow such a necessity. It is plain that if upon this record this action could be sustained against one of these defendants no one could venture hereafter to fill the situation of Speaker, and if it could be sustained against the other certainly there would be an end of independent exercise of the will and judgment upon constitutional questions by the members of that body.

Arguments were very ingeniously raised upon the possible abuses that might follow the recognition of the power exercised in this case by the Assembly, and some of them certainly were formidable in appearance at least; but every objection of this nature would equally be against the House of Commons. It is scarcely possible for such objections to be pushed to a greater length than they were by Sergeant *Jephson* in 3 Wils. 190; and they cannot receive a more satisfactory answer than is given to them in the judgments of *Ld. C. J. De Grey* and *Blackstone, J.* The true point of view in which to regard the question is that these powers are required by the House in order to enable them to promote the welfare of their constituents; we are bound to suppose that they will use them with discretion and for good ends; and if we had the power we should have no right to withhold them on the assumption that they desire to pervert the objects of their constitution.

SHERWOOD, J.—(After stating the case.)—Upon these pleadings it becomes necessary to determine the following questions:—

1st. Had the House of Assembly a constitutional right to make the enquiry stated in the defendants' special pleas ?

2nd. Had the House of Assembly a lawful right to imprison the plaintiff for refusing to answer the questions put to him by the special committee ?

1st. The House of Assembly is a co-ordinate branch of the legislature established in this province by 31st Geo. III., c. 31. The legislature so established are authorised and empowered by that statute "to make laws for the peace, welfare, and good government of this province." It is my opinion that the right of enquiry for the purpose of enabling the legislature to exercise their constitutional functions is necessarily incident to both branches ; for I do not see how they could join in making laws for the good government of the King's subjects without obtaining the information requisite to form a correct opinion of the measures and alterations proper to be adopted. I think this is an inherent right essential to every legislature. And the right of examination implies a right to compel the answering of all such questions as the law of the land will sanction. It does not appear by the pleadings what questions the plaintiff in this case refused to answer ; but I think it must be presumed they were lawful. Proper respect should be shewn to the proceedings of both Houses, and they should always be considered as acting correctly and agreeably to the rules of law and natural justice, unless the contrary appear beyond a doubt.

2nd. I am of opinion that the enquiry alluded to

was correctly made by the committee, because their acts when received and adopted by the House become the acts of the House itself. This I believe to be conformable to the ordinary course of parliamentary proceedings. As the right of enquiry implies the right of compelling answers, so, it seems to me, it implies the further right of punishing for contumacy or wilful prevarication. If it should at any time evidently appear, in the manner required by law, that the Legislative Council or House of Assembly had committed one of the King's subjects for some matter which could not with the least semblance of truth be considered a breach of privilege according to the established principles of our constitution and the laws of the land, courts of justice would do their duty and grant such relief as the law prescribes. I am of opinion that the House of Assembly had a right to punish the plaintiff for refusing to answer the questions put by the committee, and the only point, therefore, which remains to be discussed is whether they have exercised that right in a lawful manner.

It appears to me that a breach of privilege can in no instance be considered to amount to a higher offence than a misdemeanour, and consequently that it ought to be punished in the same way. There can be no good ground for asserting the existence of right in either House to impose or levy a fine; and the only mode therefore of punishing an individual, not a member of the House, which can lawfully be exercised, is that of imprisonment. Every court, from the highest to the lowest, possesses the power to imprison for contempts offered in the face of the

court. Upon as full a consideration as I have been able to give this case, I am led to the conclusion that judgment should be entered for the defendants. (a)

Per Curiam.—Judgment for defendants.

CALLAGHER V. STROBRIDGE ET AL.

In debt on bond conditioned for the limits, the plaintiff in assessing damages took a verdict for the penalty of the bond. Leave was granted him to amend by the judge's notes—altering the verdict to the endorsement on the *ca. sa.* interest and sheriff's fees as proved. Damages must be assessed in such a case.

DEBT on bond, conditioned for the limits. Breach assigned, that J. G. S. did leave the limits, and judgment by default. The damages were assessed at the last assizes for the Home District, and a verdict was taken for the penalty of the bond, and one shilling damages generally.

Baldwin moved to set aside the verdict for irregularity, alleging that the damages should have been assessed on the breach, and not taken for the penalty.

The *Solicitor-General* moved also for leave to amend the *postea* by the judge's notes. Both these rules came on together. And a question was raised whether it was necessary to assess damages in a case of this kind.

CHIEF JUSTICE.—At the trial the plaintiff proved that the damages on the breach amounted to £52, 19s. 1d. He then took his verdict for his debt, and one shilling damages. I think he has a right to

(a) See *Beaumont v. Barrett*, 1 E. F. Moore 59; *Keilly v. Carson*, 4 Moo. P.C. 63; *Fenton v. Hampton*, 11 Moo. P.C. 347.

amend the *postea* by altering his damages to what he proved. As to the propriety of assessing the damages, I am clear that it is a proper case to be referred to the consideration of a jury.

SHERWOOD, J., concurred in amending the verdict.

MACAULAY, J.—At first I thought it unnecessary to go to the jury, but on looking into the matter I am of a different opinion. When the bond is assigned by the sheriff, I take it for granted the plaintiff may recover the amount endorsed on the *ca. sa.* together with the sheriff's fees and interest, which are matter of uncertainty, and proper for a jury to compute. I have also no doubt but that the court can order the verdict to be amended. The judgment is always entered for the debt, with damages for the detention, and the plaintiff levies at his own peril the actual damage and costs.

Per Curiam.—Leave granted to amend the *postea*.

BELL v. STEWART.

When a demurrer has been argued, and judgment pronounced, the court refused to allow the demurrer to be withdrawn, a trial having been lost, although the plaintiff would have to assess his damages at the next assizes.

JUDGMENT had been given for the plaintiff on a general demurrer to the declaration in this case during this term, and the *Solicitor-General* moved for leave to withdraw the demurrer, which was opposed by *Draper*, on the ground that a trial had been lost, and that a similar motion had been made in this cause and abandoned before the demurrer was argued.

CHIEF JUSTICE.—I am opposed to allowing this demurrer to be withdrawn. The judge refused to allow time to plead, when application was made in the first instance, because it would throw the plaintiff over the assizes. The demurrer was then put in, and if this motion prevail the defendant will gain precisely what was refused him. It is laid down in the books that a demurrer cannot be withdrawn after a trial is lost, a principle, however, which I believe has some exceptions. In argument, no substantial cause of demurrer appeared, particularly to the third count of the declaration, which appears very unexceptionable. Such a precedent would be bad. It would encourage frivolous demurrers to allow this, which does not appear to have even plausible grounds, to be withdrawn.

SHERWOOD, J., differed.—I see no reason to suppose the demurrer in this case was entered with the intention of unnecessarily delaying the plaintiff; but it seems to me it was filed *bona fide* under the supposition that the declaration could not be sustained. The plaintiff, it is true, has lost a trial; but it seems clear by the books of practice, that leave is sometimes given to withdraw a demurrer, and plead issuably, even after a trial has been lost. If judgment be entered on the demurrer, damages cannot be assessed before the next assizes, and a trial can be had as soon. The plaintiff would not be injured by delay in the one case more than the other. I think the defendant in a case like this (libel), should have an opportunity of trying the facts before a jury, and I therefore think he should have leave to withdraw the demurrer and plead issuably.

MACAULAY, J.—I cannot consent to this motion. I entertain no doubt but that the matter complained of and set forth in the declaration is libellous. The ground of refusing time to plead was the delay this would occasion. Delay was not asked for the purpose of demurring, as if time to plead had been given it must of course have been on the usual terms of pleading issuably, &c. Then a demurrer is put in which throws the plaintiff over the assizes. After the assizes the defendant's counsel made a similar motion to the present, which was withdrawn before the court came to any decision upon it. The case is then argued, the objection overruled, and the declaration sustained; and now this motion is made for the second time. The demurrer did not rest on substantial grounds, nor does this motion. If the general issue were to be pleaded the plaintiff would have to prove the publication, which is now admitted. Perhaps a justification may be attempted which would put the plaintiff to proof much less accessible than it was at the last assizes; or the justification may be bad in law, and still the plaintiff would suffer inconvenience and delay in shewing this. It is true the plaintiff cannot assess his damages till the next assizes; but this is occasioned by the defendant's conduct, who ought not therefore to be allowed another opportunity of putting the plaintiff to further trouble. (a)

Per Curiam.—Motion refused.

(a) See *McLellan v. Rogers*, 12 U. C. Q. B. 651. *Deposit and General Life Insurance Company v. Ayscough*, 2 Jur. N. S. 812 (note). *Pianciani v. London and S. W. Railway Company*, 18 C. B. 226.

DOE v. ROE.

Court will not allow a declaration in ejectment to be amended by altering the name of the township in which the land for which the action is brought lies.

Baldwin moved to amend the declaration in this cause by striking out the word "Elizabethtown" and inserting "Young" in lieu thereof, as the land for which the action was brought lay in the latter township. Notice of the intention to make this application had been given to the tenant in possession before term.

The CHIEF JUSTICE thought the amendment might be allowed, both townships being within the same district, the venue would remain unaltered, and the trial take place at the same assizes.

SHERWOOD, J., and MACAULAY, J., differed, thinking the amendment prayed for went too far. A lot or concession might be amended, but not a township. In *Adam's Eject.* 201, an amendment of the parish of G. to the parish of St John in G. was allowed; but the cases are not parallel—the principal division (G.) remained; but here it is not within the same limits. The affidavit of service shews it to have been made on the tenant in possession—of course that must mean of land in the township mentioned in the declaration. (a)

Per Curiam.—Motion refused.

(a) See *Doe v. Beck*, 13 C. B. 229.

JARVIS v. WASHBURN, ONE, &C.

An attorney is liable to a sheriff for the service of writs and other papers without any particular undertaking on his part at the time of his putting them into the sheriff's hands.

A VERDICT was taken for the plaintiff by consent, subject to the opinion of the court upon the following points :—

1st. Plaintiff, being sheriff, sues defendant as an attorney for the service of writs and subpoenas for clients of the defendant both in the King's Bench and the district court.

2nd. Plaintiff's demand is composed in part of items for the services of notices and other papers not writs.

3rd. Plaintiff's demand also contains items for money paid for postages and swearing affidavits.

4th. The writs and papers were sent by the defendant, as attorney in the causes to which they relate, by post in the ordinary way, with directions from him to the sheriff to have them served ; but with no particular undertaking on the part of the attorney to be personally liable.

The court were clearly of opinion that the attorney is liable to pay the sheriff's fees, and cited the following cases :—2 C. & P. 118 ; 5 B. & C. 328 ; 2 B. & A. 562 ; 12 Ves. Junr. 349 ; 2 M. & S. 438. (a)

Judgment for plaintiff.

(a) See Mayberry v. Mansfield, 11 Jur. 60 ; 9 Q. B. 754 ; Seal v. Hudson, 4 D. & L. 760 ; Maile v. Mann, 2 Exch. 608. See also Davis v. Jenkins, 11 M. & W. 745 ; Lee v. Everest, 2 H. & N. 285.

ROBINET V. LEWIS. (a)

The court refused to arrest the judgment in dower on an objection that the declaration stated the tenant had been *attached* to answer instead of *summoned*.

The *Attorney-General* moved in arrest of judgment. The declaration stated that the tenant (Lewis) was *attached* to answer, but he should only have been *summoned*. All the forms agree that this is the correct mode in an action of this description. Then there is another objection; it is not stated that the tenant had possession, or was seized of any property out of which dower should be assigned, although the demandant's right to dower is admitted and established, still before the tenant can be charged it should appear by the record that he has lands out of which her demand can and ought to be satisfied.

Sullivan, contra, insisted that the first objection came too late; and if there were any weight in it the court would not entertain it at this stage of the case. The second he contended was answered by considering that the tenant by going to issue only on the right of the demandant to claim dower, as not being a subject, had in effect admitted that he had lands out of which her dower should be satisfied if she could establish her right to dower at all.

CHIEF JUSTICE.—I am of opinion that the judgment ought not to be arrested. The objection raised cannot I think be received now upon a motion in arrest of judgment. There has been a verdict which not only cures statements of actions defectively made, but which in many cases is taken to supply

statements wholly omitted. The case in 3 Burr. 1725, is a strong authority on that point; but here the objection not only comes after verdict, but after a demurrer by the defendant upon another objection, which demurrer was argued and withdrawn after perceiving the judgment of the court to be against him. It is impossible, I think, that having abandoned his demurrer after an argument in which he might have urged, though I will not say successfully, the very objection he is now making, and having gone to a jury upon another issue which in its very nature waives the objection now urged, the defendant can now arrest the judgment upon an objection which he omitted to take upon his demurrer. Str. 425 is, I think, incompatible with such a course; although I admit that the circumstances of the two cases are not the same. Then as to the merits of the objection itself, if it were not now too late to urge it, and if nothing but the verdict had intervened, I cannot say that I think it would be sustainable. If the defendant had no interest in the premises in which dower is demanded, he might and should have pleaded *non tenure*; but aware, as I must take it, that he could not with truth make such a defence, he rested his case upon an objection to the demandant's right, not disclaiming that he had the premises, but denying her right to dower, and putting her to prove it. The declaration corresponds precisely with the forms of declaration in dower, *unde nihil habet*; but it is contended that an averment of the defendant being tenant is not introduced into the declaration in the English forms, because there it is necessary that the defendant should have been previously summoned in his

character as tenant, and therefore when he appears he acknowledges his tenure, unless he disclaims, and the averment of his tenure is intended in the reference to the process by summons contained in the declaration. But without determining whether our statute imposes an absolute impossibility of proceeding in this case otherwise than by *capias*, and whether, if it do not, the allegation in this declaration that defendant was *attached* to answer may not mean attached *after having been summoned*, which is quite consistent with the form of proceeding in England, it seems to me that we are not called upon to assume that the *capias*, which is not set forth, did *not* in this case contain a command to summon Abijah Lewis, tenant of lot, &c. Such an addition would not have vitiated the process, and, for all we can tell upon this record, it may have run in that form. At all events, I consider that in any point of view the judgment ought not to be arrested on this motion. Whatever there might be in the objection, if urged in season, I should have been happy at all events to have seen such an objection raised when it might have been strictly entered into upon its legal merits, because it is desirable that the proper remedy for recovery of dower in this province should be clearly settled.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Curiam.—Rule *nisi* refused.

MEIGHAN ET AL. V. BROWN.

Two plaintiffs of the name of M. The non-repetition of the surname after each christian name in the bail-piece is not a sufficient irregularity to warrant taking an assignment of the bail bond.

The defendant in this cause had been arrested and put in special bail. In the bail piece the plaintiffs were mentioned as Michael and Robert Meighan, not repeating the surname to each christian name. On this objection an assignment of the bail bond was taken, and also that the notice did not mention before whom the bail was put in.

The court set aside the proceedings against the sheriff's bail without costs—saying, however, the plaintiffs should have excepted to the bail.

King for plaintiffs, *Taylor* for defendant.

COZENS V. RITCHIE.

When an affidavit to hold to bail was made while defendant was in the United States, and was left in this province in readiness in case he should come over, the court set aside the arrest.

Sullivan moved to discharge the defendant from arrest—1st, Because he had been discharged from the same debt by the insolvent laws of the State of New York; 2nd, Because the affidavit to hold to bail was made while defendant was in the United States, where he had been a long time resident, and was left in this province in order to his arrest if he should come over.

Per Curiam.—It is clearly settled that being discharged by a foreign law does not operate on the cause of action, only on the remedy; nor does it

operate so as to stop the plaintiff from suing according to the forms of law here. The defendant being discharged from all further arrest in the United States cannot free him from being arrested here. But the arrest is bad on the second objection. To make an affidavit of an apprehension that defendant will leave the province when he is already out of it, and has been so for a length of time, and when that affidavit is evidently made in the hope and expectation that he will return to it, is contrary to the spirit of the laws of this province, and an evident abuse of the process of the court. On such an affidavit the defendant should not have been held to bail. (a)

Per Curiam.—Rule absolute.

VINCENT v. M'LEAN.

When a cause was referred to arbitration on a verdict taken by consent—and the award being made in vacation, final judgment was entered before the first day of next term. The judgment was *held* irregular.

A VERDICT had been taken in this cause by consent, subject to arbitration. The award was made formally in vacation. A rule for judgment was then put up and entered in the Crown office, and at the expiration thereof final judgment was entered.

The court held the judgment irregular. If it were otherwise, a party would be barred from applying to the court for relief from any injury or

(a) Plaintiff and defendant were foreigners, and came into this province intending to remain only a few hours; the plaintiff made the usual affidavit and arrested defendant. *Held* regular, *Raynor v. Hamilton*, Mich. Term, 2 Vic.

injustice that might have been done him. The award stands on the same footing as if the verdict had been rendered at that time.

Attorney-General for defendant, *Solicitor-General* for plaintiff.

POWELL V. M'MARTIN, ONE, &C.

In order to obtain an attachment for non-performance of an award, the affidavit of service and demand should shew that the person making the demand was attorney for that purpose, and that the party on whom the demand was made was apprised of that circumstance.

On shewing cause against a rule *nisi* for an attachment for non-performance of an award in this cause, it was objected that it did not appear by the affidavit of service and demand, or in any other way, that the authority of the plaintiff's attorney for making the demand was shewn to the defendant at the time, and Watson on Awards, 187; Bl. Rep. 990, were cited.

The court thought the demand insufficient, and the sum awarded being payable to the plaintiff or his attorney, meant an attorney to be for that purpose appointed; and of this appointment it should appear the defendant was duly apprised.

They therefore refused the rule.

Small for plaintiff, *Spragge* for defendant.

GENERAL RULES AND ORDERS.

EASTER TERM, 11TH GEO. IV.

1. It is ordered by the court that the 18th rule of this court be rescinded, and that henceforth the clerks of assize shall attend in court during the first four days of the term immediately following the assizes in each district, with all indictments, records, and proceedings from their respective circuits, together with the various exhibits filed in each cause, and not returned to the parties by order of a judge, and that they shall immediately after the rising of the Court on the fourth day of its sitting return to the Crown office all indictments, records, proceedings, and exhibits remaining in their possession, and shall at the same time deliver to the Clerk of the Crown a list of the same.

2. It is ordered by the court that from and after this term of Easter, on every judge's summons or appointment to be made by the master (having been served on the day previous to that on which the attendance shall be required), the person on whom the same shall be served, and who shall be required to attend, shall attend such summons or appointment without a second, or on default thereof the judge or master may proceed *ex parte* on the first.

3. It is ordered by the court that after this term the practice of the Court of King's Bench in England with respect to Imparlance shall not be in use in this province, but that in all cases the party shall plead at the expiration of the demand of plea unless he obtain an order for further time.

4. It is ordered by the court that hereafter no rule to plead, reply, or rejoin shall be necessary, but that a demand shall be sufficient, as in respect to a plea in actions by non-bailable process.

5. It is ordered by the court that hereafter it shall be sufficient to leave the consent and plea in ejectment at the office of the Clerk of the Crown and Pleas, and that no entry thereof need be made with any judge.

6. It is ordered by the court that hereafter it shall not be necessary to furnish issue-books or paper books in any case, and that the clerks in passing the record shall add the *similiter* as of course.

7. It is ordered by the court that the 5th rule of this court, made in Michaelmas Term 4th Geo. IV., be rescinded, and that in future no original declaration or other pleading, roll, or record shall be received in the office of the Clerk of the Crown and Pleas or of any of his deputies, unless the same be engrossed or written in a plain and legible manner.

8. It is ordered by the court that hereafter any number of names may be included in one writ of subpoena.

9. It is ordered by the court that in any action of the proper competence of the district court in which final judgment shall be obtained without a trial, the master shall tax no more than district court costs, unless specially authorised by order of the court or of a judge in vacation.

10. It is ordered by the court that fees shall not in any case be taxed to more than two counsel upon any trial or argument to be had hereafter.

11. It is ordered by the court that no counsel's fee on motions shall be taxed in respect of any rule which may be obtained without filing a motion paper in court in term time.

12. It is ordered by the court that no fee or other charge shall be payable for any writ to warrant a *testatum*, unless such writ shall be actually sued out by the party.

13. It is ordered by the court that at the foot of every bill to be hereafter taxed the attorney shall certify under his hand that every service and disbursement charged has been actually and necessarily rendered and made, which certificate shall nevertheless in no case be taken to dispense with the requisite affidavit of disbursements, or to warrant any charge not otherwise taxable.

14. It is ordered by the court that after this present term of Easter in every case in which the costs taxed shall exceed £20, it shall be necessary for the attorney obtaining the taxation to leave with the master a fair copy of such bill at the time of taxation, which copy shall be furnished gratis; and that the master shall deliver into court during each term all such copies of bills as have been furnished to him since the preceding term, on which shall appear the allowance as they have been taxed.

15. It is ordered by the court that an order for revising taxation may issue as a matter of course upon a motion in court or upon a judge's summons, and that all fees upon such motions or orders shall be taxed as on motions of course.

A new table of costs was also settled and ordered by the court.

In this term *James Doyle, Charles Oliver, George McDonnell, John Wood, and William F. Murney*, Esquires, were called to the bar

TRINITY TERM, 11 GEO. IV., 1830.

Present :

THE HON. JOHN BEVERLEY ROBINSON, Chief Justice.

“ LEVIUS PETERS SHERWOOD, Judge.

“ JAMES BUCHANAN MACAULAY, Judge.

SMALL ET AL. v. MCKENZIE.

In an action for libel, the publication given in evidence consisted of a report of a trial and defendant's comments thereon. The libellous matter set forth in the declaration was altogether contained in the comments. At the trial the defendant gave in evidence, in justification under the general issue, that the report of the trial was correct, and obtained a verdict. A new trial was granted without costs, on the ground that this evidence was improperly admitted.

CASE for a libel. The plaintiff was a candidate at the election for the town of York in November last, and defendant was an elector. The plaintiff is also an attorney, and this action was brought to recover damages for an alleged injury to his character, both as an attorney and a candidate to be a member of the House of Assembly in Upper Canada. Some time before the election the present plaintiff prosecuted a man of the name of Hogg for defamation, and recovered damages. The present defendant, who then was, and still is, editor of the *Colonial Advocate*, attended the trial of the suit against Hogg at his request, and made a report of the evidence and of some other part of the proceedings in that cause, which he afterwards printed and published in the form of a handbill, accompanied with remarks and comments of his own on the tendency and bearing of

the evidence, and reflecting strongly on the plaintiff's character. The declaration set out the most offensive part of those comments, in which the character of the plaintiff was most severely reflected on. The defendant pleaded not guilty, and two special pleas amounting in substance to this—that the report of the evidence and transactions at the trial between the present plaintiff and Hogg was a true report, and warranted the comments of which plaintiff complained. The plaintiff took issue on the first plea, and demurred to the two last; and at the last assizes for the Home District the record was carried down to try the issue and assess contingent damages on the demurrer. At the trial *Sherwood*, J., before whom the cause was tried, allowed the defendant to give in evidence that the trial of *Small v. Hogg* was truly reported in justification of his comments, though that report was contained in a part of the handbill distinct from the libel set forth in the declaration. The jury found for the defendant, and in Easter Term last *Draper* obtained a rule *nisi* to set aside the verdict and grant a new trial on the following grounds:—

1st. That the defendant under the plea of the general issue could not legally prove in bar of this action the correctness of the report of the evidence and other proceedings in the action against Hogg.

2d. That the judge should not have directed the jury to take the truth of the report into their consideration as forming a defence to this action.

Sullivan shewed cause. The evidence given at the trial was that a certain part of the libel was a true

report of the trial between Small v. Hogg. The part set out on the record was only a commentary on the report. The whole paper was given in evidence, and the part complained of was founded on the other part of the same handbill. This evidence came from the plaintiff, and defendant was therefore entitled to prove its truth. He could not plead in justification. Whenever a plaintiff proves extraneous circumstances, which the defendant cannot justify on record, he may give evidence either to support or rebut them. The declaration states the commentary only, not the facts on which it is founded, and the defendant should be allowed to prove those facts. The defendant made the report of the trial at the instance of one of the parties (Hogg), and as plaintiff has not asserted its falsehood it is to be presumed true; and if so, to prove its truth puts the plaintiff in no worse situation. Stark on Slander, 230. At all events the evidence was proper to rebut the charge of malice.

Draper, contra, argued that the doctrine contended for by the other side would do away the necessity of pleading specially altogether; that as the pleadings in this case stood to allow this evidence to go to the jury was taking the plaintiff wholly by surprise, for had the matter been properly pleaded he might have come down prepared to rebut it. Had the action been founded on the report of the trial, then this evidence would have been proper; but it is founded on the gratuitous remarks of the defendant, and admitting the trial to have been truly reported, this would have been no justification of those comments. The defendant should have gone further, and have proved the truth of the facts stated in the report of

the trial, to have made his justification complete; and surely it will not be said this can be done under the general issue. The case reported in 3 B. & A. 702, shews clearly that the evidence was not admissible on the issue joined.

SHERWOOD, J., delivered his opinion this day as follows (after stating the case):—When the publication was read at the trial of this case, it struck me that the defendant did not himself intend to cast any imputation on the plaintiff's character, but only to state what appeared to him would be the inevitable inference likely to be drawn by the public, in case the evidence which he reported were true, and also to induce a belief that it was in the power of Hogg to offer stronger evidence than he had yet given: under such impression I allowed the defendant to prove that the report of the evidence published by him, and which apparently formed the basis of his comments, was a correct statement of the evidence given at the trial of the suit against Hogg. I thought at the trial that such evidence was admissible under the general issue as a defence to the action, but still I had some doubt of its legality for that purpose, and allowed it to be given, because I think it best to receive evidence when there is merely a doubt attending its admission. The parties are not concluded by this course, for they have a remedy if the evidence upon more mature consideration should be found improper. In my opinion it is only in a case where a judge entertains no doubt that evidence is to be wholly rejected. In the present case the jury found for the defendant, and the new trial was moved for last term on two grounds.

1st. The defendant, under the plea of not guilty, could not legally prove in bar of this action the correctness of the report of the evidence, and of the other proceedings in the action against Hogg.

2nd. That the judge should not have directed the jury to take the truth of the report into their consideration, as forming a defence to this action.

If the former objection be sustainable, the latter is of course. Since the motion for a new trial I have examined and considered the publication of the defendant with more attention and scrutiny than the hurry of a trial generally allows, and I think the defendant has gone further than I at first supposed. I think the comments of the defendant, as stated in the declaration, contain an imputation against the plaintiff of dishonourable and dishonest conduct. On shewing cause the counsel for the defendant seemed to consider this in the nature of a privileged case, and contended that the comments of the defendant were justified by the occasion on which they were published, and therefore the evidence was properly received under the plea of the general issue. If I could consider the case in that point of view I should still retain the opinion of the evidence which I formed at the trial that it was admissible, and should now think the verdict ought not to be disturbed, although the evidence was admitted upon an entirely different ground. I consider the present case, however, as an ordinary case of libel, and not in the nature of a privileged case. Had the defendant confined his publication to the report of the proceedings which occurred at the trial of the suit

against Hogg he might have proved the truth of that report in justification of his conduct under the general issue. I do not wish to be understood that the editor of a newspaper has a right to publish the proceedings which take place at every public trial. A case might happen when it would be improper to publish the whole or some particular parts of the evidence or other proceedings at the trial. The evidence to which the plaintiff in this case objects was not given in justification of publishing a report of the judicial proceedings, but in justification of the defendant's comments on those proceedings. The remarks of the defendant and the report of the trial are distinct transactions which essentially differ in their character and tendency. The correctness of the latter may be proved in way of justification under the general issue; but the truth of the former must be specially pleaded when they cast an imputation on the character of an individual for which an action will lie.—3 B. & A. 702, 3 B. & C. 24, 3 Bing. 88. That part of the evidence given at the trial of this case to which the plaintiff objects was admitted in bar of the action, and for the purpose of leading to a verdict; but I now think it was inadmissible for that purpose under the general issue, and consequently that there should be a new trial; I think the costs of the first trial should abide the event of the second, as was ordered by the court in 3 Bing. 88. It may be proper to subjoin that besides the general issue the defendant in this case has pleaded two special pleas to the whole declaration. A part of the matter alleged in the special pleas in justification of the supposed libel is substantially the same as that which was given in evidence

at the trial. The plaintiff has demurred to the special pleas, but no argument has yet followed, and no judgment has been given. It appears to me that I am bound to decide the question which the plaintiff has raised to the propriety of admitting the evidence given at the trial, without any reference to the special pleas or any anticipation of the result of the demurrer. This is my reason for not alluding to the special pleas in the first instance.

The *Chief Justice* and *Macaulay, J.*, having both been concerned in the cause of *Small v. Hogg*, and being both liable to be called upon as witnesses as to what transpired at that trial, gave no opinion.

Rule for new trial absolute.

GATES V. CROOKS.

Where a plaintiff at the trial abandoned all the counts in his declaration but one, and had a verdict on that one, the defendant is not entitled to a verdict on all the other counts; and if such a verdict be rendered, the court will on application discharge it, leaving the plaintiff to dispose of the other counts at his own risk.

The declaration in this case contained several counts on different promissory notes. At the trial the plaintiff proved one note of hand, and took a verdict on the count in which the note was set forth. The jury found for the defendant on all the other counts. In Easter Term last the *Solicitor-General* obtained a rule *nisi* to discharge the verdict rendered for the defendant, and was opposed by

The *Attorney-General*.—The courts have always set their faces against splitting actions.—1 Ventr. 73,

and this would have an effect exactly similar. Parties are even frequently obliged to consolidate; yet here, where the different causes of action are joined, the plaintiff seeks without any apparent reason to divide them.—See 2 T. R. 639. He elected to take his verdict on the particular count. The jury consequently were obliged to find for the defendant on the other counts, for they cannot give a verdict on part of the record only unless discharged from the other part by the consent of the parties.—3 Bing. 381; 1 Wils. 300. Here no such consent was given, and the defendant insisted on his right to a verdict, which the jury have given. When a plaintiff does not appear, and defendant does, a nonsuit shall be entered; so, by analogy, where he gives no evidence on part of his declaration a verdict for so much shall pass against him.—Str. 844; Ld. Raym. 1521; 1 Saund. 207 (note); Doug. 376. A contrary practice would occasion gross injustice. In an action composed of different claims, the defendant, meaning to contest some of them, brings witnesses for that purpose only. But if the plaintiff's object be to harass and oppress him he gives evidence of that alone which the defendant never contemplated contesting, and brings a second action, thereby putting the defendant to the expense of two defences where one would be enough. A *nolle prosequi* is only entered where a party has a general verdict and some of the counts are bad.—3 Smith, 113. This is a very different case.

Solicitor-General, contra.—Where there are several causes of action, and a general verdict is given, a new action may be brought for those causes of which no

evidence was given at the trial of the first. It is no bar to a subsequent action; it cannot therefore be a reason for the defendant to have a verdict. Courts will after a general verdict compel a plaintiff to elect on which count he will take judgment—5 Taunt. 36; and after electing the court in a penal action refused to allow him to change.—2 Doug. 730; 16 Ea. 130. The plaintiff may enter a *nolle prosequi* to some counts, and take a verdict on one only; and a *nolle prosequi* may be entered at any time.—Str. 531.

Judgment was delayed till this term.

SHERWOOD, J.—The question for decision is one exclusively of practice at *nisi prius*. It is from analogy, general principles, and professional experience only that any argument can be drawn in favour of either party, as there are no authorities bearing directly upon the point; and I am free to admit that my present opinion is given with some doubt. The declaration in this case contains a number of counts upon several distinct causes of action as well as the common counts. The defendant pleads *non-assumpsit* to all the counts jointly. At the trial the counsel for the plaintiffs, in his opening, stated that he would give evidence in support of the fourth count only, and that he did not intend to proceed on the other counts. He did so, and there rested the case. The defendant's counsel offered no evidence, but insisted that if the plaintiffs took a verdict on the fourth count only they had a right to a verdict on all the other counts. To this the plaintiff's counsel objected, insisting that defendant had not the right claimed. A verdict was, however, taken for the plaintiff on the

fourth count, to which there was no objection, and for the defendant on all the other counts, subject to be struck out if the court above should be of opinion that he had no legal right to a verdict under the circumstances. I have looked into all the cases cited by the counsel in argument last term, but it appears to me they afford nothing conclusive of the question. The right of either party to claim a verdict was contested. So far as I can collect from the law, and the cases at all applicable to this question, they go to establish the following principles;—1st, The plaintiff may elect to proceed on some counts of his declaration, and forbear to proceed on others.—1 Saund. 207 b. 2d, The party on whom the proof of the issue lies has a right to a verdict according to the evidence.—3 Comm. 375; Doug. 376. 3d. If he fail in establishing the issue which he attempts to prove, the opposite party has a right to a verdict, unless the plaintiff elect to be nonsuited.

In the present case, although the general issue is pleaded to all the counts jointly, I consider it in the nature of a several plea to each of the counts, because each special count contains a distinct cause of action independent of that contained in any other special count. It has been decided that each count in a declaration forms a distinct declaration of itself.—1 Salk. 133; 3 Comm. 295; 3 Wils. 185. I will now endeavour to shew how the principles which I have just mentioned apply to the present case. At the trial the plaintiffs abandoned every count in the declaration but the fourth, and gave sufficient evidence to entitle themselves to a verdict on that count. The jury were sworn well and truly to try

the issue joined between the parties, and a true verdict give according to the evidence. There were in effect several issues joined, and the plaintiff's counsel, before giving evidence, elected to give evidence in support of one issue alone. The proof of all the issues lay on the plaintiff. Now it seems to me that in a conscientious point of view the jury were restrained by their oath to give their verdict on one count only, otherwise I cannot perceive how they would give a verdict according to, or, in other words, agreeably to the evidence, when the counsel for the plaintiff elected to proceed only on the count to which that evidence applied, and made known his intention of doing so in his address to the jury. In ordinary cases, when the plaintiff does not elect to proceed on that particular count, and the declaration contains several counts, the evidence is given on the whole declaration generally, and it is not the practice for the jury to discriminate with nice precision the exact part of the declaration to which the testimony would apply.—2 Stark., N. P. 442. The defendant cannot oblige the plaintiff to elect at the trial of a particular count to enter his verdict on, although the declaration contain many counts, and the evidence of the plaintiff do not apply to all of them.—5 Taunt. 36; 1 B. & A. 161. The last two cases seem to me in principle to go a great way in deciding the present question. If the defendant have no right to insist upon a verdict when the plaintiff's evidence is given on the whole declaration, but is insufficient to maintain the issue on some of the counts, I cannot think he has a right to claim a verdict when the same evidence is given on the counts only to which it is applicable, and the plaintiff

formally abandons the other counts, and no evidence is given on them. There can be no good reason in my opinion for entering a verdict at *nisi prius* for the defendant in any case without evidence, and as a matter of right, unless the plaintiff refuse to be nonsuited, and insist upon a verdict being given. In such a case the verdict is rendered against him of course; but the verdict comes at his own request. In the present case the verdict was given without evidence and against the plaintiffs' will. The distinction is obvious in my opinion so far as regards the strict right of the defendant. A verdict may undoubtedly be entered in almost any way with the consent of the parties; but that is entirely a different consideration from the present, where each party disclaims accommodation, and takes up a position on the high ground of *summum jus*.

The principal reasons advanced by the defendant's counsel are the two following:—1st, That as the jury were sworn to try the issue joined between the parties, they could not discharge their consciences without giving a verdict on all the counts. I have already remarked on this head, and I think it unnecessary to make any additional observations. The second reason was that the defendant had been put to expense in preparing for his defence. This is decidedly an argument *ab inconvenienti*, and if there were anything in it it would apply with equal strength to many parts of the established practice of this court. The defendant is not entitled to costs when the plaintiff enters a *nolle prosequi* at any stage of the proceedings to a part of his declaration, although such entry is continually made, and there is no doubt of its legality.

In the present case, should the verdict remain as it is, the defendant could recover no costs, and consequently the right which he claims would be insufficient to produce the effect. Upon the whole it appears to me the entry of a verdict for the defendant under circumstances like those that attend the present case, if at all allowed, must always be a matter of practical convenience, subject to the discretion of the judge at *nisi prius*, and the ultimate control of the court above. The remaining counts in the declaration contained distinct causes of action; the counsel for the plaintiff believed the interest of his client required him to forbear further proceedings on those counts, and he expressed his determination to do so; there was no evidence to show on which side justice had ranged as respected those counts; the defendant had neither merit nor testimony, and the jury had nothing to try. It seems to me the practice at *nisi prius* did not require a verdict to be entered for the defendant under such circumstances as a matter of right, and I am therefore of opinion that it should be struck out. If the plaintiffs be desirous of entering up judgment on the fourth count of the declaration they will find it necessary first to dispose of all the other counts; and if they enter up their judgment and cannot legally do this the defendant will have his remedy by way of appeal. If the plaintiffs allow the present action to remain as it is, and bring a fresh suit for the same causes, the defendant can plead the pendency of this action in abatement of the other. These last considerations are not necessarily involved in the disputed point, but they serve to show that the defendant is not deprived of any advantage to which he has a just and legal claim. They further shew that

if a plaintiff take a verdict on one count only when the declaration contains many, he tacitly undertakes to dispose of the remaining counts in some other way, or submits to the consequence of entering an erroneous judgment.

The *Chief-Justice* and *Macaulay*, J., having been retained in this cause when at the bar, expressed no opinion.

Rule absolute. (a)

GRACE V. MEIGHAN.

If defendant's attorney file common bail for him, it is a sufficient appearance.

King had on a former day moved for security for costs, on the ground that the plaintiff resided out of the province, and to stay proceedings until such security be given. *Washburn* shewed cause, and objected that the defendant was not in a situation to make this application, not having, as he contended, entered an appearance. A common bail-piece has been filed by the defendant's attorney, but this is not according to our statute 2 Geo. IV., c. 1, for that act distinguishes between the defendant's appearing and the plaintiff's appearing for him. In the former case the defendant is to enter and file an appearance, in the latter the plaintiff is to enter common bail for him.

CHIEF JUSTICE (after stating the case). — There seems to be no good reason in the nature of things for resorting in this province to the fiction of common bail. This court has its jurisdiction in all cases by statute, and without the necessity of imagining the

(a) Vide 1 M. & M. N. P. C. 322.

defendant in custody upon some other cause; the putting in common bail therefore has no sensible object, but still it has been made a part of our proceedings. In all unprovided cases this court has by rule adopted the practice in England, and if this were an unprovided case we should then have to enquire what that practice was; but this case is provided for by our own statutes, and in a manner that appears to us to sanction, if not to render necessary, the mode of appearance by entering common bail. The statute 2 Geo. IV., c. 1, sec. 4, enacts that when the defendant does not appear the plaintiff shall enter "common bail" for him; that is, he shall do for the defendant what the defendant within the proper time ought to do for himself. In England it seems not very clear from the books of practice whether in actions by original a defendant usually appears by entering common bail, or whether he is merely to enter a common appearance. According to Tidd, it seems that he ought to enter a common appearance only, and that it is when the action is by bill or summons and attachment that the defendant should file common bail, but the other books of practice do not lead clearly to that conclusion. If in an action so commenced entering a common appearance were clearly the regular proceeding, it does not therefore follow that a defendant having entered common bail could be said not to have appeared, because in the British statute, 12 Geo. I., and 5 Geo. II., appearing and putting in common bail seem to be used as equivalent expressions; and in the form of notice directed by statute to be put upon non-bailable process, the party is told he must appear when it is intended that he is to put in common bail. In 1 Salk. 8, it is ex-

pressly said by the court that common bail is an appearance as well as bail. Independently of any reasoning on the English practice, our statute recognises that manner of appearing, and we are therefore of opinion that the defendant in this case has appeared to the action, and that the plaintiff, if no other objection be urged, must give security for costs.

The other judges concurred.

Per Curiam.—Rule absolute.

COOPER V. THE CANADA COMPANY.

A writ of *distringas* is not the proper process with which an action against a corporation aggregate should be commenced in this province.

A writ of *distringas* had been issued in this cause, upon which the sheriff returned issues. The *Solicitor-General* moved to set aside this writ on the ground that no writ of summons had been previously sued out and served, and therefore there was nothing to warrant the *distringas*.

Baldwin answered that as there was no Chancery here out of which the writ of summons could be sued, and as the court had decided that a *capias*, which is the original writ of this court, was not a process to serve on a corporation, a *distringas* was in fact the first and only writ the plaintiff could have to commence his suit.

The court after stating that although the statute 2 Geo. IV., c. 1, prescribes only an original writ of *capias* which cannot go against a corporation aggregate, expressed an opinion that it did not prevent a

suitor from availing himself in other cases of such description of process as by the law and practice of England is proper in such cases. They therefore, under the authority of that statute which created the court, made a rule directing the process of summons to be issued against corporations aggregate, leaving the law and practice as to service and appearance to stand upon our general adoption of the law of England, and of the practice of the Court of King's Bench, and made the

Rule absolute.

LEONARD, ESQ., SHERIFF v. MERRITT.

Several actions having been brought on a bond to a sheriff for the gaol limits, the court granted a rule to consolidate them.

The plaintiff had instituted a separate action against each obligor in a bond, conditioned, that one T. M. should not depart the gaol limits. The court, on motion of *Draper*, stayed the proceedings in all the actions but one on the defendant's entering into a common consolidation rule.

HOLT v. JARVIS, SHERIFF.

In an action against a sheriff for seizing and taking goods, it is sufficient to prove that the deputy sheriff seized them "*colore officii*," without proving the writ of execution or giving other evidence of his being deputy sheriff than that of general reputation.

TRESPASS against the sheriff of the Home District, for seizing, taking, and carrying away boards the property of the plaintiff. The cause was tried before the Chief Justice at the last assizes for the Home District, and after the plaintiff had closed his case the Chief

Justice expressed doubts as to the sufficiency of the evidence to sustain the action. The plaintiff's counsel, anticipating a charge unfavourable to his client, took a nonsuit, with liberty to move to set it aside if the court above should deem the evidence sufficient to go to the jury. The facts proved were as follows:—Hollister was the known deputy of the defendant, and acted in that capacity. He went to the lumber in question, stood upon the pile, and publicly declared that he seized it, and forbade any person to meddle with it. A part of the same lumber was afterwards taken away; but it did not appear by whom nor what quantity. No writ of *fi. fa.* to authorise the seizure was proved to have been delivered to the sheriff.

Sullivan last term obtained a rule *nisi* to set aside the nonsuit, and for a new trial. He argued that the evidence adduced made out a *prima facie* case, at all events sufficient to go to the jury; that the production or proof of the writ of *fi. fa.* was not necessary, as Hollister acted professedly in his character of deputy sheriff, and that his connexion with the sheriff was sufficiently proved by general reputation. He cited 1 Lord Raymond, 190; 7 T. R. 117; 7 B. & C. 535.

The *Solicitor-General*, *contra*, argued that plaintiff, having closed his case, and seeing every reason to anticipate an unfavourable verdict, should not be allowed to take a nonsuit, and then move to set it aside in order to go down to a second trial better prepared. That Hollister was to be viewed not as the deputy but the bailiff of the defendant, and therefore it was incumbent on the plaintiff to prove his

authority derived from the defendant. That there was no proof the defendant authorised the trespass, as there was not a tittle of evidence to show that Hollister was acting under a process directed to the sheriff, or that he was not proceeding on his own authority and at his own risk ; and lastly, that the evidence adduced did not shew any trespass to have been committed. The fact of Hollister's declaring he seized the lumber and forbidding anyone to interfere with it amounted to nothing ; and the mere stepping on the pile cannot be construed into such a corporal taking of possession as would *per se* constitute a trespass.

The court took time to consider, and now delivered their opinion.

CHIEF JUSTICE.—In this case it was my impression at the trial that the plaintiff was bound to give some proof that there was actually a process under which the deputy then was acting, and that the mere assertion of the deputy that he was acting *colore officii* was not sufficient to charge the sheriff with the consequence of his acts. It seemed to me necessary to shew that a duty had been by law imposed upon the principal officer (whom alone the law regards), and where that was shewn there could be no doubt that the sheriff must answer for all irregularities and abuses of the subordinate officer in the execution of his duty.

Such is the law with regard to bailiffs of the sheriff, whether general or special, and such it appeared to me, on the first impression, ought the law to be even in respect to the acts of the under sheriff ; the reason-

able protection of the sheriff seeming to require it. But on more deliberate consideration and examination of authorities I think otherwise. It is true that in a note by Mr Douglas to his report of the case of Ackworth and Kempe he seems evidently to consider the under sheriff as standing on the same footing with a bailiff, for he says "if the act of the bailiff is not the act of the high sheriff, neither is the act of the under sheriff;" and in 7 T. R. 113, the impression of Mr. Justice Grove seems to have been that under the authority of *Yabsley v. Doble*, in *Lord Raymond*, a bailiff who gives a bond of indemnity to the sheriff stands on the same footing as an under sheriff. If this were really so, then it would have been necessary in this case to shew that the deputy was really acting under colour of some process, for with respect to bailiffs that must be shewn; but the case in 7 T. R. 113, and other authorities, shew that there is a clear distinction between a bailiff and the under sheriff, who, as Lord Kenyon says, "is the general deputy of the sheriff for all purposes." The latter represents the sheriff fully and in all things; he gives bond that he will well and truly demean himself in his office, and it would be extremely prejudicial to the community if he could, when clothed by the sheriff with this authority, assume and profess to act in his name, without at the same time making the sheriff responsible for his acts. It would also, for obvious reasons, be injurious to the public peace. I think therefore that the opinion I formed at the trial on this point was erroneous. And as it may have had some influence in inducing the plaintiff to accept a nonsuit, I think he should have a new trial on the terms that the costs shall abide the event;

a condition which I deem reasonable, because on one other ground at least his case was so defectively made out at the last trial that I am not sure a sense of that would not at any rate have determined him to accept a nonsuit as a matter of prudence. If I could be assured of that I should of course not set aside the nonsuit, but as I cannot be certain on that point I think the plaintiff should have a new trial. I cannot say that in my opinion he proved no cause of action such as he declared for, though I adhere to the opinion I stated at the trial, that the evidence was not such as gave him a claim to compensation for property he alleged to have been seized, and if the case had gone to the jury it would have been necessary to submit to them another consideration, whether the possession of Holt were *bona fide*, or whether the transfer made by the two Churches were not colourable and fraudulent, on the principle of the case in 5 Burr. 2631 (*Martin v. Podger*).

SHERWOOD, J. (after stating the case, and the points urged by the defendant's counsel), as to the first objection—the plaintiff elected to be nonsuited. If a plaintiff voluntarily request a nonsuit on grounds which originate with himself, and respecting which he has formed his own opinion, independently of any suggestion of the judge, I think he should give very urgent reasons to entitle him to a new trial. The present case, however, is different, as the judge ordered a nonsuit with leave to move, and therefore it seems to me the plaintiff is not precluded from making the present application.

As to the second point, that Hollister must be considered as the bailiff, and not the deputy of the de-

fendant—it appeared by the evidence that Hollister was the known deputy of the defendant, and acted in that capacity before the alleged trespass was committed, but there was no evidence to shew that he ever had any warrant to act as bailiff. I therefore think that Hollister was the deputy, and not the bailiff of the defendant.

As to the third objection, that there was no proof that the defendant authorised the trespass; from the report of the trial there certainly does not appear to have been any evidence of a special authority from the defendant to Hollister to seize the goods in question, or indeed, to seize any goods belonging to the plaintiff. It was proved, however, that Hollister was the known deputy of the defendant, and acted in that capacity generally. Now, I consider this as *prima facie* evidence of holding and exercising the office of under sheriff, which is an office as well known as that of sheriff, and so far incorporated with it that the act of the deputy for all civil purposes is the act of the sheriff himself. All suits for wrongs must be brought against the sheriff, although the deputy is in fact the sole agent in the transaction against which a complaint is made. No action can be brought against the deputy or bailiff for anything done which relates to the office of sheriff—Cowp. 403; 2 Bl. Reports 832. By the statute 3 Geo. I, c. 15, sec. 11, the under sheriff is to be appointed by the sheriff, and to take the like oath as the sheriff, *mutatis mutandis*; and in case of the death of the sheriff the under sheriff is to act as high sheriff till a new sheriff be appointed, and while he acts as high sheriff he may appoint a deputy sheriff who by

virtue of the statute will possess the like power and authority as himself. The official acts and admissions of the deputy sheriff are binding on the sheriff, because he is the general officer of the sheriff for all purposes, and the sheriff is responsible for all injurious acts done by his officers, *colore officii*, when deputed by him to execute the law.—Doug. 40 ; 2 T. R. 148. This is not the case with a bailiff, who is only a special officer of the sheriff; and therefore it is necessary in every case to show a privity between him and the sheriff, as well as a special authority to act.—1 Ld. Ray. 190 ; 7 T. R. 119 ; 7 B. & C. 535. I think the plaintiff established a *prima facie* case against the defendant by proving that Hollister acted officially as deputy sheriff when he seized the lumber, and if the fact had been otherwise it was incumbent on the defendant to show who was his deputy, as I take it for granted he had one, because it is his duty to appoint a deputy. The general law with respect to principal and agent is, that the principal is not responsible for the acts of the agent beyond the limits of the particular business or commission in which he is employed ; but in the case of a sheriff the law extends his responsibility much further, on the broad principle of necessity and public policy. It is for the interest of society in general that all official acts of the sheriff or his deputy in civil cases should be peaceably submitted to when done in the ordinary course and manner of public business, but this would not be the case if the sheriff himself were not answerable for the official acts of his known officer whom he appointed, as the law presumes, because he is trust-worthy, and whose character ought to be known to him. If the sheriff

give a warrant to his bailiff to seize the goods of A., and he seize the goods of B., trespass *vi et armis* lies against the sheriff, for the law views the sheriff and his officer as one person, and the act of the bailiff becomes the act of the sheriff—3 Wils. 317. The deputy is the general officer of the sheriff for all purposes within the scope of his office. The bailiff is the officer of the sheriff for a particular purpose only; but when either acts *quatenus officii* of the sheriff and commits a trespass, the sheriff is answerable *civiliter*, but not *criminaliter*: the sheriff may employ whom he pleases, but he is responsible for the acts of all those employed by him.—2 T. R. 156. It has been objected by the counsel for the defendant that it was necessary for the plaintiff in this case to shew that the under sheriff had a writ of *fi. fa.* against the goods of some person before the sheriff could be made liable in this action, but I think no such necessity existed. This doctrine is recognised in 7 B. & C. 535 *in notis*, that when an authority is proved to have been given by the sheriff it is sufficient. Here a general authority is established, because Hollister was the general officer of the sheriff, and acted officially in that character; but had he been a bailiff a special authority must have been proved.

As to the fourth point, that the evidence does not shew a trespass to have been committed—under this objection it will be necessary to examine whether there was an actual seizing or taking possession of the lumber; and if there were, whether such act amounted to a trespass. When personal chattels are bulky and cumbersome, and it is impracticable

for the sheriff to remove them immediately, there is no other way by which he can seize them than by performing acts which shew his intention of dispossessing the owner, and by declaring that the acts are done for the purpose of changing the possession. Here all these requisites coincide. If the sheriff seize hay, or unthreshed corn in stack, or growing crops in the field, he must do so somewhat in the same way as he did in this case. It is quite impossible for him to remove them instantly; and if it were once admitted that such unwieldy and ponderous articles were not in the custody of the law by such acts of the sheriff, and that the owner had a legal right to make use of them, many frauds would be the consequence, and many judgments would eventually be unproductive, because more was required to be done by the sheriff than it was possible for him to do. The sheriff by his officer in this case publicly declared that he seized the lumber, and forbade anyone meddling with it. It seems to me that he could do no more with this description of property; that he had dispossessed the owner and taken the goods into his own possession at the time. The removal of the goods might have rendered the custody of them less hazardous for the sheriff, but was not indispensably necessary, in my opinion, to constitute a seizure. In 1 M. & S. 711, the sheriff's officer went to the house of the debtor and declared that he came to levy on his goods, but made no manual or actual seizure, except laying his hand on a table and saying, "I take this table," and then locked up his warrant in the table drawer, took the key, and went away without leaving any person in possession of any part of the goods which were in

the house. It appears by the case that the seizure was considered good, both by the court and by the counsel, although that was not the point determined. The question then was, whether the possession was abandoned, and the court determined that it was, which they could not have done had they considered that there never was any possession taken of the goods by the sheriff. Presuming then that Hollister did seize the lumber as under sheriff, and that the defendant is answerable for his acts, the last question to be determined is, did such taking of possession constitute a trespass. Trespass *vi et armis* may be brought by him who has the possession of goods, of a house, or of land, if he be disturbed in his possession.—1 Inst. 57; Co. Litt. 4 b.; 6 East. 602. In Detinue and Trover the plaintiff must have a property in the thing for which the action is brought, otherwise it cannot be sustained; but possession alone is sufficient, in trespass against all the world, except the rightful owner: for the injury done to the possession is the foundation of the suit. If one man dispossess another of his goods, and return them in as good a state as when he took them, still trespass will lie for the change of possession, and the jury may give damages in proportion to the actual injury proved. In addition to the actual injury, the plaintiff has also a right to give in evidence the particular circumstances which accompany and give a character to the trespass; and the jury are not restrained in their assessment of damages to the actual loss of the plaintiff, but may award further damages on account of the insulting and malicious conduct of the defendant, when the trespass was committed. I am therefore of opinion that the non-

suit should be set aside, and a new trial granted, and that the costs should abide the event of the suit.

MACAULAY, J., having been concerned as plaintiff's attorney in case of *Comfort v. Church*, gave no opinion. (a)

Per Curiam.—Rule absolute.

WHITEHEAD, ONE, &C., v. FOTHERGILL AND BROWN.

The process of this court can only be served by the sheriff, or some one of his lawful officers.

The court set aside the service of the process in this cause, because it had been served by a person not a sheriff's officer. The statute 2 Geo. IV., c. 1, directs that the process shall be served by the sheriff, his deputy, or a lawful bailiff. In this case it had been served by a clerk of the plaintiff. In giving his opinion, however, *Macauley*, J., remarked that though by the strict letter of the act the service in this case was bad, it might be a question whether such were the spirit of the statute or the intention of the legislature. When the writ of *capias ad respondendum* was substituted for the writ of summons, it became necessary to enact that the sheriff should serve it, for he could not otherwise have been bound to serve a copy of process which on the face of it required the defendant to be arrested.—2 Geo. IV. 1821), c. 7, and 2 Geo. IV. (1822), c. 1, sec. 4.

Baldwin for plaintiff, *Attorney-General* for defendant.

(a) See *Mink v. Jarvis*, 8 U. C., Q. B. 397; 13 U. C., Q. B. 84; *Gregory v. Cottrell*, 2 Jur. N. S. 16; 5 E. & B. 571.

HYDE V. BARNHART.

When a defendant, after obtaining his weekly allowance, takes the benefit of the limits, he must give notice of his return to close custody before he is entitled to further payment.

Washburn moved to discharge the defendant in execution out of custody for the non-payment of the weekly allowance. *Draper* shewed cause, and produced affidavits that the defendant had been out on the limits some time, and that no notice had been served on the plaintiff's attorney of his return. He contended, first, that notice was necessary, and secondly, that by going on the limits the defendant had waived all right to his allowance, and must obtain a new rule for it before he could claim his discharge for non-payment.

SHERWOOD, J., after taking time to consider, decided that clearly the plaintiff was entitled to notice. He also intimated that his impression was with the plaintiff on the second point, but gave no opinion.

The CHIEF JUSTICE and MACAULAY, J., having been concerned as counsel in the cause, gave no opinion.*

 WILLARD V. WOOLCOTT, ADMINISTRATOR OF
M'MURTRIE.

The court allowed a judgment on a *sci. fa.* against an administrator to be amended in the name of the intestate by making it correspond with the original judgment against him; on a return of *devastavit a. ca. sa.* does not issue as a matter of course without inquiry.

Washburn moved to set aside the judgment on *sci. fa.*, the writ of *fi. fa.*, and the *ca. sa.* issued in this cause for the following irregularities:—the original judgment and the writ of *scire facias* were both right,

* This case, though moved in term, was decided at Chambers.

but the judgment on the *sci. fa.* was entered against Woolcott, administrator of M'Martin, with which the *precipe* for the *fi. fa.* corresponded, but the writ was against the administrator of M'Murtrie. The *ca. sa.* was right in the name, but it was issued on the sheriff's return to the *fi. fa.* of a small levy, and a *devastavit*, and on an affidavit, stating the return of the *devastavit*, and that plaintiff was apprehensive defendant would leave the country, &c. The *ca. sa.* appeared to have issued for the whole amount, though the sheriff had returned a small levy to the *fi. fa.*

Baldwin moved a cross rule to amend the judgment on the *sci. fa.* and the subsequent proceedings as far as the return on the *fi. fa.*; and the court on this day gave judgment on both rules after argument.

Washburn for defendant.—The application to amend comes too late, and to grant it would in effect be allowing a new roll to be made. No case can be found in which the court will admit a judgment to be amended by the insertion of a new name—2 Str. 1209—a judgment against an executor shall not be amended to his prejudice. In this case, without the amendment prayed for, the administrator is entitled to his discharge. At all events the *ca. sa.* should be set aside. It is founded on a judgment not in existence. There is no judgment on *sci. fa.* against the administrator of M'Murtrie, and the affidavit on which the *ca. sa.* is founded is defective in not stating the sum due and for which the writ is sued out.

Baldwin, contra.—This application is not to amend the name of the defendant, but an adjunct to his

name. The error is one of mere misprision, and is therefore clearly amendable. As to the motion for setting aside the proceedings, the opposite party are irregular in giving notice of their intention to move on one ground, and in term taking a new and totally different objection. If the court grant the amendment prayed the only remaining question is as to the *ca. sa.* This writ is not founded so much on the judgment as on the sheriff's return of *devastavit*. It may be doubted whether an affidavit be at all necessary; it can certainly only be required for the purpose of complying with our own statute in stating the plaintiff's apprehension that the defendant is about to quit the country.

CHIEF JUSTICE.—In granting this amendment to the extent asked, it does not appear to me that we are authorising a new judgment to be made. But I am strongly impressed that before the *ca. sa.* was issued, a *scire feci* enquiry should have taken place. My present opinion is that the *ca. sa.* is unwarranted. The sheriff returned on the *fi. fa.* a levy of part *de bonis testatoris* which is entered of record, and yet the *ca. sa.* is issued for the whole sum. With respect to the affidavit, this is a case *sui generis*. The true ground of the arrest is stated in the affidavit, *i.e.*, the return of the *devastavit*, and I should think this sufficient. I am of opinion that the *ca. sa.* should be set aside, and the amendment as far as the return of the *fi. fa.* allowed.

SHERWOOD, J.—I give no positive opinion as to whether an enquiry be necessary or not; at present I incline to think it is not required. I agree with the Chief Justice as to the amendment.

MACAULAY, J.—I agree as to the amendment ; but with regard to the *ca. sa.* I think it unlawful. The party should have an opportunity of defending himself upon a return of *devastavit*. An executor cannot be held to bail without a judge's order, and I cannot see upon what ground a *ca. sa.* should issue, when under the same circumstances a *ca. re.* could not. The affidavit is I think defective in not stating the amount, and the practice of issuing a *ca. sa.* under these circumstances, though it once prevailed, has I believe become obsolete.

Per Curiam.—*Ca. sa.* set aside and amendment allowed.

THE KING v. JUSTICES OF NEWCASTLE.

Justices of the peace cannot apply the district funds to building a new gaol and court house without an act of parliament specially conferring that authority.

The *certiorari* which had issued last term to the justices of Newcastle had been brought in on a former day, and the return filed. The return set forth various orders of session, applying large sums of money towards building a new gaol and court house in the Newcastle district.

There were orders also to authorise a committee to enter into contracts for building, and to obtain a lot of land adjacent to the old gaol and court house, and to authorise levying a full rate for the present year. It appeared also that the building had been commenced, and about £2400 of the district funds actually expended on it.

The *Attorney-General*, on the return being filed, moved to quash these orders on two grounds: 1st, that without an act passed for that express purpose, the justices had no power to build a new gaol and court house; and 2d, that they had no authority to apply the rates and assessments for that purpose.

Washburn and *Rolph* shewed cause, and produced an affidavit that no gaol and court house had been built in the district of Newcastle out of the district funds. They then argued that a general authority was conferred on all magistrates by provincial statute, 32 Geo. III., c. 8. The statute was by the 42 Geo. III., c. 2, expressly extended to the district of Newcastle. The magistrates by the former of these statutes are enabled to contract in the name and on the behalf of the district. By the 45 Geo. III., c. 5, the place mentioned in the 42 Geo. III. is altered. Now, as the building hitherto used as a gaol and court house was not built out of the public funds, the magistrates have not yet exercised the authority vested in them by law, and are at this moment only doing what the statute empowers them. It was also contended that the British statutes, and particularly 24 Geo. III., c. 54, were in force here under our general adoption of the law of England.

Attorney-General, contra.—Viewing this proceeding as a misapplication of the public money, I felt myself called on to interfere on the part of the Crown. It is immaterial out of what funds the present gaol and court house were erected. It must have been built under authority of the 45 Geo. III., or else it could not have been in its present situation; and the magistrates were limited to two years from

the passing of that statute to have the building finished. It is therefore impossible to say that they are now acting under its authority. The sum they have now expended on the new building exceeds the annual income of the district, and they have ordered a new rate. But the application of the district funds to this purpose is no legal expenditure, and all that money, in the eye of the law, is still in the treasurer's hands. The order for a new rate is therefore contrary to 59 Geo. III., c. 7, s. 8.

The court took time to consider, and this day their opinion was delivered by

The CHIEF JUSTICE.—In this case the court are moved to quash certain orders of the quarter sessions for building a gaol and court house in the district of Newcastle, which orders have been removed hither by *certiorari*, granted on the prayer of the Attorney-General. It is objected to the orders that they are absolutely illegal, the justices having, as it is said, no power to build a new gaol and court house without express legislative authority, from whence it is urged that they are expending the district rates on a building which when it is finished cannot be appropriated by them to the purpose for which it is erected. Such an expenditure it is also contended is beyond their authority, and it is stated as a grievance resulting from these orders that by undertaking these buildings without any legal right they are uselessly incurring such an expenditure as compels them to continue upon the inhabitants of the district the charge of a full rate when otherwise it would not be required. On the part of the justices these orders have been defended, and they have maintained: 1st,

that they had a right to erect a gaol and court house for the district; 2d, that they had a right to place it where they have placed it; and 3d, that they had a right to appropriate the district rates towards defraying the charge of the buildings.

There cannot be a more convenient arrangement of the question than this order, in which it was considered on the argument; but everything manifestly depends on the opinion that may be formed on the first point, since if that be found to be unsupported it is to no purpose to discuss the others.

If the justices had no power of themselves to take measures for erecting a gaol and court house, it follows of course that they had no right to place it anywhere, or to expend any public moneys upon it. Now all that can be material to the decision of this first question lies in a narrow compass. It is stated in books of the best authority that by the laws of England "gaols are deemed to be of such universal concern to the public that none can be erected by any less authority than by Act of Parliament"—2 Inst. 705 is expressly upon that point; and accordingly in England the statutes 23 Hy. VIII., c. 2; 5 Eliz., c. 29; 13 Eliz., c. 25; 11 & 12 Will. III., c. 19; and 24 Geo. III., c. 54, have been passed to establish a convenient system for the regulation of this important matter, on which the interposition of legislative authority was so clearly held to be necessary.

The last mentioned statute is now in force in England, and the provisions it contains are exceedingly judicious and convenient, and such as in general are perfectly applicable to the circumstances of this province.

It has been argued on the part of the justices in this case that the statute 24 Geo. III., c. 54, is actually in force here; but without deciding that question it is sufficient at present to say that no authority to be derived from that statute could justify these orders; and indeed, in considering their validity, the statute may, without prejudice to the justices, be left out of view. It is either in force here or it is not. If it be not, of course these orders cannot be vindicated under its authority. If it be in force, nothing can be more certain than that these orders were illegally made, because that statute wisely provides that there must be a presentment of a grand jury, and that public notice must be given before such measures are entered upon as have been adopted here. That the general principle of the common law of England, which requires the authority of the legislature for erecting gaols, is in force here I have no doubt. It is a principle involving important consequences to the administration of justice in civil and criminal cases. It remains therefore only to examine whether that principle has been superseded or destroyed within this province by any general act of our legislature. I think it has not, but rather that it has been recognised and received confirmation by several provincial statutes, so that in my opinion, as applied to the several districts of this province, there is no general continuing authority under our local laws, residing in the justices, enabling them to build new gaols or court houses either when the former have gone to decay or are thought by them to be inconveniently situated. There is next to be enquired whether, in respect to the district of Newcastle particularly, there was vested in the justices,

by reason of any legislative enactment, or of any circumstances, a power to make the orders which are now before us for erecting a gaol and court house in their district. The arguments that were raised on the provincial statutes 42 Geo. III., and 45 Geo. III., were ingenious; but they must fail to produce conviction in any one who will carefully examine them. The 3d section of 42 Geo. III., c. 2, enacts that until such time as the said gaol and court house in and for the district of Newcastle aforesaid shall have been erected and built, whether out of the fund produced by the district assessments and rates or otherwise, it shall be lawful for the majority of His Majesty's justices of the peace residing within the district to appoint some place therein for holding of the courts of general Quarter Sessions of the Peace, and of all the other courts held at a place certain in the said other districts of this province. Upon this clause it is clear that whether the gaol which has been built in the township of Hamilton, which by the 45 Geo. III. was substituted for the town of Newcastle, were built from the district assessments, or, as it was said, from the subscriptions of individuals, it is nevertheless to be recognised as the legal gaol of the district. It is admitted to have been long used as such, and the justices in their order gave no other reason for desiring another than that the gaol then used was untenable. This being so, I cannot entertain a doubt that no other gaol can be substituted for it by the mere act of the justices, and I think it was correctly stated in argument that if this gaol were now completed it could not be legally used, and would not constitute the gaol, and the prisoners could not legally be moved into it. The case in 7 Mod. 280 is in point expressly.

But though this is my opinion at present, I desire to be understood as merely intimating that opinion, and not pronouncing a formal judgment. The question from its general nature is important. It may affect other districts, and the sooner it is known in what light it appears to the court the better. Upon the propriety of quashing these orders immediately I have not come to a conclusion, though as to the power to quash them I have no doubt, on the authorities cited last term, and particularly 4 T. R. 591. It has been said in the Court of King's Bench, in a case somewhat similar, that though these questions may appear clear to the judges, they may not have appeared so clear to the justices; and, indeed, it was candidly admitted in argument here that the justices most probably conceived they were doing nothing but what was right and their duty. In 1 Burr. 247, Mr. Justice *Denison* says he "will intend everything in favour of the justices in their orders." It is denied by no one that the present gaol and court house are altogether insufficient. The justices in their orders declared it to be untenable or untenable, and that is not disputed. It was necessary, therefore, to provide another. It is not alleged that the old one should or could have been repaired. To have built on the very same site could not have been done without pulling down the old one, and thus leaving the district without any gaol. The justices have not presumed to change the site to any other part of the district than that which the legislature had sanctioned. If they had, I could not have looked upon that measure in the same light that I regard their present order. They set about building a new gaol in the same place, though not on the very foundation of the

old one. I think it very possible they may have conceived they were acting within the scope of their authority. If others, who complain of their orders, did not think so, why did they not peremptorily apply for the interposition of this court. The reason was given last term. It was said they or their counsel were not aware such a course could be taken. I perceive that one of the gentlemen whose affidavit was filed on the motion for the *certiorari* that was made last term was one of the justices present when these orders, or some of them, were made. He either concurred then or dissented, and in either case he must be supposed not to be aware that the justices could be restrained and their orders quashed, or he should have applied before many hundreds of pounds have been expended upon contracts entered into, and before the building was far advanced towards its completion. Terms were suffered to elapse and nothing done, and if this arose because others were uncertain or ignorant what the law was, it is not unreasonable to suppose that the justices were under a like misapprehension. The only ground on which we can at this late day be asked to quash these orders must be grounds purely public; for all private persons were debarred by statute from obtaining a *certiorari* from the delay. Now, I much fear we should be doing more injury than good to the public by immediately quashing these orders. If, as is denied by no one in argument, a new gaol be wanted, it is no grievance in fact that a full rate is continued in order that funds may be applied to it. If the inhabitants of the district desire another site to be appointed, they have had more than one opportunity since these orders were made to apply to the legislature, without whose

authority the site could not be changed ; and of that fact they could scarcely be ignorant, though it may not have been sufficiently known that the justices required legislative sanction to build a new gaol in the same situation. It is the want of that authority which alone raises an objection ; we cannot know whether the legislature would refuse to confer it, or whether the inhabitants generally would desire anything else, and therefore I think we should be acting most discreetly, considering how lately recourse has been made to us, to forbear any final interposition till the legislature can have an opportunity of deciding the matter. I am aware that from the same causes the Court of King's Bench in England have suspended pronouncing their judgment even when they had no doubt upon the legal question involved ; and I am happy to find that on an occasion exceedingly similar the same course was taken by the judges, and avowedly in order to give parliament an opportunity of rendering legal, if they should think fit, an order of justices that was plainly out of the scope of their authority. I refer to the case of *Rex v. Loxdall and others*, Burrows 445 ; and upon that authority, although I do not pretend not to have made up my mind upon the legal question, I pronounce no judgment at present upon the motion for quashing these orders. The justices, however, are not to understand that they have the sanction of the court, either express or implied, for continuing to act upon the orders which have been removed ; but that the court only forbear at present pronouncing their judgment for quashing these orders, and thereby absolutely nullifying all that has been done, which would throw upon the justices, and possibly upon the district, the most

inconvenient consequences. If the legislature shall decline to interfere, such a judgment of this court as the law may require must ultimately be pronounced.

SHERWOOD, J., and MACAULAY, J., concurred.

CHURCH V. BARNHART.

In debt on bond, order for particulars of breaches will be granted.

DEBT on bond, conditioned that a prisoner in execution should not leave the limits. *Baldwin* moved for particulars of breaches, and the court seeming inclined to grant the application, it was consented to by the *Solicitor-General*.

TRUAX ET AL. V. CHRISTY.

The court refused to set aside several special pleas on the ground that they amounted to the general issue, which was also pleaded on motion. *Semble*, plaintiff should have demurred.

ASSUMPSIT on a special agreement. The declaration contained two counts on the agreement, and the common counts. The defendant pleaded the general issue and seven special pleas. The facts pleaded were such as could have been given in evidence under the general issue; one was fraud and covin. Notice was given to the defendant's attorney of the plaintiffs' intention to apply to the court to strike out all the pleas but the first, and on a former day that motion was made by the *Solicitor-General*. The *Attorney-General* shewed cause. The court will not strike out pleas on motion unless they are evidently absurd and nonsensical or filed vexatiously. In the present case every plea will be a good defence to the action,

if proved. Excepting one, they are all pleas of a condition precedent; and if this had been an action of covenant they must have been so pleaded. It is true that the court have granted motions similar to this, but it is principally in cases when pleas leading to different issues are put in without necessity. As where one plea would be tried by the record, another by the Bishop's certificate, another to the country, and a demurrer. Each of the issues to be thus tried must be determined by a different mode, and if these pleas appear unnecessary the court will strike them out. It is too much to say that the pleas in this case can be considered trifling with the court, or abusing the indulgence allowed of pleading several matters, when every plea constitutes a good defence. The *Solicitor-General*, in reply, urged that these pleas were to be considered in the same light as unnecessary counts in a declaration, which the court will frequently strike out on motion. The same reason applies; all that can be proved under any of them can be proved under the first, and the record is unnecessarily loaded with pleadings, all the facts of which are substantially put in issue by the general issue; he cited 1 Chitty's Rep. 355; 2 Chit. Rep. 642; 1 Bing. 66; 7 Mod. 351; 6 M. & S. 134. Judgment was given to-day by the *Chief Justice*, as follows:

The CHIEF JUSTICE.—The ground on which the court will set aside pleas is, where they are either double, or inconsistent with one another. In this case we are asked to do so, because it is alleged they amount to the general issue, which is also pleaded. This is certainly a good ground of demurrer, but it does not by any means follow that we should decide

it on motion—perhaps it is desirable that the court should assume such a power; but I am not prepared to do it without any precedent. I cannot find that it has been done in any similar case in England, although there are many reports of demurrers argued on objections precisely similar. None of the cases cited shew this to have been the practice, but rather the contrary, and I am not at present prepared to introduce a new system.

SHERWOOD, J., concurred with the *Chief Justice*.

MACAULAY, J., differed.—I think that from a view of the case a principle may be extracted. The party must obtain the leave of the court to plead double in England. Here he does it by authority of our statute, but it is done subject to the power of the court to correct and restrain him. Suppose that in England a defendant asked leave to plead five or six such pleas as are put in this case, would the court permit him? I think certainly not. In an action for an escape, or founded on a bill of exchange or a promissory note, the general issue would put the parties plaintiff on proof of every material fact. Ought a defendant in such a case to be permitted to split the facts of the defence into several special pleas? In this case the declaration sets out every material fact and allegation, and the plaintiff is put to the proof of each of these by the general issue—for what good purpose are they denied in distinct pleas? The courts do not hesitate to strike out superfluous counts in a declaration. I cannot see any principle by which that course can be distinguished from the present. The whole defence can be proved under the general issue. Nothing is stated in any of the special

pleas which is not admissible under that plea. The pleas are evidently useless, and that being the case, I think they should be set aside. The learned judge cited the following cases: 3 T. R. 124; 13 Ea. 255; 2 B. & A. 197, 777; 4 T. R. 194; 1 Chit. Rep. 526, 565.

Per Curiam.—*Diss.* MACAULAY, J.

Rule refused.

DOE ON THE DEMISE OF MAGHER V. CHISHOLM.

In an action of ejectment between a person claiming as heir and a stranger the court allowed very slight evidence of pedigree to go to the jury. When the jury found that a will had been revoked upon very conflicting evidence, the weight of which, in the opinion of the judge who tried the cause, was against the finding, the court refused to grant a new rule.

EJECTMENT for lands in Toronto of which one Thomas Carroll died seised. The cause was tried at the last assizes for the Home District before the *Chief Justice*.

At the trial the evidence to prove the lessor of the plaintiff, the heir-at-law of Thomas Carroll, was as follows:—that Thomas Carroll employed a person to write to Ireland to inquire about his sisters and their children; that a letter was received in reply stating that his eldest sister was dead and had left two children, viz., the lessor of the plaintiff and his sister. There were other members of his family spoken of, but excepting one sister they all appeared to have died without issue. The sister was said to have been married, and to have left a son, whose death was not clearly proved. The lessor of the plaintiff came to this province with his sister, and they were acknowledged by Thomas Carroll as his

relations. The defendant's counsel objected to this evidence as insufficient to support the claim of heirship, but was overruled, and then proved by two subscribing witnesses that Thomas Carroll before his death made his will and devised this estate to the defendant. The will was put in and its execution duly proved. It was further proved that Carroll being an old man and expressing his confidence in the defendant, made a deed for his (Carroll's) life to him on condition of being maintained for the rest of his life. On the following morning he expressed his dissatisfaction at having put his property out of his own hands; and, as was sworn by the subscribing witnesses to both deed and will, called for the deed, which was given to him, and he threw it on the fire and burnt it. Other witnesses for the plaintiff swore that it was the will that he called for, and that they understood it was the will he burnt. Different declarations of Carroll were proved, both affirming the destruction of the will and denying it. The *Chief Justice* charged the jury that the weight of evidence was in favour of the defendant, and in support of the will, but the jury found for the plaintiff.

Washburn last term moved for a rule *nisi* to set aside the verdict on the ground of objection to the evidence of heirship, which he had taken at the trial, and that the jury had gone contrary to law and evidence in finding against the will; and on a former day in this term

Sullivan shewed cause.—The literal expression of the Statute of Frauds had not always been adhered to by the courts in their different decisions on the subject of the revocations of wills. The statute does

apply to implied revocations; and there are numerous cases in which wills have been set aside on that ground. In fact there are but very few cases of actual revocations to be found reported. In 2 Bl. 1043, and 2 Vern. 742, it appears that the statute has not in every case been construed according to its strict legal meaning; a more liberal construction has prevailed. Where a party lies under a mistake, thinking he had made a good will, and then cancelling another, this will was held not cancelled. The intention was to substitute one will for another, not to die intestate, and as the second will was not good, the first was held not revoked but in force. So in this case the same principle would apply the other way. The party evidently intended to revoke, and did an act which would have been a complete cancelling, under the idea he was cancelling his will. But supposing this not sufficient, as the will is actually in existence, under the circumstances proved, the will is revoked in law. Where a party after making his will does any act to alter his estate, that act revokes the will. Even a devise to an heir at law though void has the effect of revoking the will. 2 Atk. 324, 579. Now the agreement which was made to convey the land to the defendant on condition of maintaining Carroll for his life, and which was proved to have been executed after the will, operated as a revocation. The will therefore was at all events revoked, and the defendant's title therefore failed, and the jury have found by their verdict that the lessor of the plaintiff was Carroll's heir at law.

Draper, contra.—The case in *Atkyns* was a recovery which altered the estate. So is the case of

an owner enfeoffing another to his use. Every case in which a will has been revoked by any deed or alteration of the estate, proceeds upon the principle that the act done was inconsistent with the devise. The devise here is in no way affected by the agreement; and that objection therefore fails. There are two questions to be considered in this case: 1st, was there evidence to go to the jury of the heirship? 2nd, was the will revoked?

As to the first question.—In a collateral claim the heir must shew that he and the deceased are both sprung from the same common stock; 2 Bl. Rep. 1099; and that all the branches interposed between the claimant and the ancestor, which if in existence would have a preferable title, are extinct; 15 Ea. 274 (*a*). The evidence in this case on these points seems principally to consist in letters which do not appear to have been written by any member of the family; and which do not set forth on what authority the statements they contain are founded. Surely this is too slight to bear the name of evidence, and should not have been referred to the consideration of the jury at all. The second point turns on the construction of the Statute of Frauds. The words of that act applicable to the alleged revocation in the present case are “*burning, cancelling, tearing, or obliterating.*” It is not pretended that the will in question was either burnt, cancelled, torn, or obliterated; but it is argued that the testator’s intent was to burn, and that as this act was prevented by the fraud of the devisee it operates as a revocation. Great strictness is required by the statute in the execution of will to pass lands, and the decisions shew that a

rigid compliance has always been required with its terms—Show. 89. The words relative to a revocation are equally strong with those referring to the execution of a will. The destruction of all the sheets but one of a will under particular circumstances was held no revocation—Eq. Ca. Abr. 409. It is a principle that the execution of a second will revokes a former—3 Atk. 798. Yet when a second will was executed, but the witnesses did not subscribe in the testator's presence, it was held that the first will though cancelled was not revoked—2 Vern. 742. So when there was a second will, but the contents were unknown—Sal. 592; 3 Wils. 497. Wherever the court have leaned to a liberal construction it has been to support the will. Here they are asked by that means to destroy it. The most unequivocal intention to devise would not avail unless done according to the statute; why then should it to revoke, admitting that the fraud alleged was clearly proved, which was by no means the case. It is clear that the mere intention to revoke unaccompanied by the act cannot affect the will—3 Burr. 1244; 4 Burr. 2512; 3 B. & A. 489. As much perjury and fraud might be committed to revoke the wills as to set them up; and if evidence of a testator's intention to do that which he manifestly has not done can be admitted for the purpose of destroying the will, half the benefit of the statute will be lost. The court took time to consider, and this day their opinion was pronounced by the

CHIEF JUSTICE.—This is an action of ejectment brought by John Magher as heir-at-law to Thomas Carroll deceased, to recover certain lands in the

township of Toronto, of which Thomas Carroll died seised. It was tried at the last assizes for the Home District—the proof of pedigree was by no means satisfactory and conclusive, but I thought there was legal evidence of the relationship sufficient to be left to a jury; and it was accordingly left to them, with remarks upon its inconclusive and unsatisfactory nature; and at the same time with explanations that the law relaxed much of its strictness in receiving evidence of pedigree; and that it enabled claimants to recover upon *prima facie* cases, though not free from doubt in all circumstances. Proceeding upon the principle that when the contest is not between two persons both claiming to be heir, but between a person claiming to be heir and a stranger to the deceased, the court may be satisfied with a *prima facie* case, it being at all times open to any person having a better right to the inheritance to appear and make good his claim. In this province more especially, which is inhabited principally by emigrants from other countries whose pedigree could not be strictly traced in most cases without great delay and expense, and not without doubt and difficulty in many cases, from the obscurity of the claimants, there is need of all the liberality extended by the courts in England to persons offering proof of pedigree. It was contended, however, that the plaintiff must in this case be nonsuited, for that there was absolutely no legal evidence of heirship to be left to the jury, and the point is again moved against the verdict. The case in 2 Bl. 1099 and 15 Ea. 293 were cited to support this position. The case in *Blackstone*, when it is compared with the present, is sufficient, I think, of itself to shew that there

was evidence of pedigree in this case proper to be submitted to the jury, and that in such a case as that cited the court should have been divided in opinion as they were furnished an authority in favour of the present lessor of the plaintiff. The two cases cited in the argument of that case are much weaker than the present, and it is not denied that verdicts were obtained in them; nor is the authority of these cases objected to. The principal case in 15 East. is decidedly in favour of the plaintiff here, and the case in the note, which was the authority cited for the defendant, does not apply here, inasmuch as the lessor of the plaintiff did produce evidence by hearsay, such as the law in these cases receives, that the brother died without issue. John Magher, now dead, is proved by Thomas Magher to have declared to him that all the brothers died without children. That declarations of deceased members of a family are admissible evidence to prove relationship is too clear to be disputed, and this principle applies even where the members of a family are not related by blood. It was so decided in 13 Vesey Jun. 148. See also 3 T. R. 719, 723; besides this, other evidence was given to the same points, such as appeared to me at the trial, and I think still, to be admissible for the purpose for which it was produced, though it was extremely weak and liable to objection, as was explained to the jury; and, at all events, upon the whole evidence, it is impossible to say there was not evidence of pedigree to be submitted to the jury. It was such as left room for much doubt, but it was left to the jury, and with a charge strongly in favour of defendant upon another ground; but the jury found for the lessor of the plaintiff. The case on his side

would have been much less open to suspicion if he had produced his sister as a witness, or accounted for not producing her, since she could unquestionably have given more direct testimony respecting the family than any that was offered, and so the jury were told.

Whether John Magher were sole heir or not was very doubtful on the evidence, but no objection on that score was raised at the trial. Some enquiry was made of Thomas Magher as to a third sister of Thomas Carroll, and whether she was married or not, but he could give no evidence on the subject, and none was obtained of any other witness. The time of Carroll's death was not clearly ascertained, and it does not appear on the notes whether it was before the death of Edward Magher, the only child as appears of the married sister of John Magher's mother. I apprehend, although I do not find it to have been clearly made out, that Edward Magher survived Carroll. If he did he would inherit a moiety, taking the case most strongly in favour of the lessor of the plaintiff, and excluding the claim of any other persons than the children of the intestate's two sisters; but being a joint tenant with John Magher, the latter would take the whole estate by survivorship.

So far as respects this part of the case I am not disposed to disturb the verdict. There was some evidence of pedigree certainly, and more than has been deemed sufficient in other cases. The jury were satisfied with it, and if in truth there be a better heir behind he may come forward and establish his right. Then as to the next point in the case, after the plain-

tiff had proved his case as heir, the defendant set up a title to himself as devisee, and produced and proved a will of the testator devising the estate to him in fee. The will is a valid will in its terms, and was properly executed; but the heir at law contends that it is not a subsisting will, the testator having manifested his intention to cancel it by an act which it is maintained is sufficient for that purpose. The case is new in its circumstances; the opinion which I expressed to the jury at the trial seems to me now, after more deliberate consideration, to be correct; and though I have been unable to find any case exactly similar, the principle on which the opinion rests is supported by authority.

Besides others that may be cited, the case in 2 Vesey Junr. 426, expressly decides in respect to the revocation of wills that the law is the same in courts of law as in courts of equity. Lord *Loughborough* in that case delivers an elaborate judgment upon that point, in which he says:—"It struck me as a point of great difficulty to make out, without very cogent authorities, that a court of equity could adopt different rules as to the transmission of estates from the rules at law, and upon the fullest consideration I can give it I adhere to that idea, which I think I shall shew to be founded not only upon such reasoning as satisfies my mind, but upon the strongest authorities, that there is no distinction whatsoever; and this court has no authority, nor has ever attempted to exercise an authority, to determine that revocations of wills are subject here to different rules from those that would govern that question at law. The creation and transmission of estates must be governed by the

same law in both courts." In 6 Vesey Junr. 215, 7 Vesey Junr. 348, the principles of revocations are laid down, which are equally applicable in law as in equity; and these and other cases on that point confirm me in the opinion that if the jury found from the evidence that Carroll having made his will, delivered it into the possession of Chisholm the defendant, and soon afterwards repenting of the disposition he had made demanded it back of Chisholm in order that he might destroy it; and that Chisholm meaning fraudulently to impose upon Carroll, who was an illiterate man, unable even to read, delivered to him another paper, declaring it to be the will; that Carroll had thereupon destroyed that paper in the presence of Chisholm, imagining he had destroyed his will, and died without making any other—if the jury found this to be the case, then I think Chisholm could not be suffered to advance this will in a court of justice as a valid subsisting will, and thus take advantage of his own wrong.

Mr. Roberts, a respectable writer upon the law of wills, thus expresses himself upon the subject of revocations—"Parol evidence of the facts accompanying the act of cancelling is clearly admissible. The principle, however, of the admissibility of parol evidence for this purpose requires that in a case when the intended cancelling or destruction of the instrument has been prevented by fraud or contrivance, affirmative proof of the *animus revocandi* should also be received, and that effect should be given to the intention so established, even if such intention so endeavoured to be defeated by fraud were manifested by no act of the testator; it would be conso-

nant to the general maxims of courts of equity to give effect to the intention, and to treat as perfected that which would have been perfected but for the fraud. So the slightest act of tearing, or an incipient burning amounting only to scorching, will satisfy the statute when the intention to revoke can be manifested by accompanying acts or even declarations, but that without *proof of fraud* or *partially executed intention* parol evidence could be received to shew a design to cancel, unaccomplished through mistake or accident, no case has yet established. Such a latitude would indeed tend to frustrate the caution of the legislature in respect of this object of the Statute of Frauds." Mr. Cruise says of revocations—"Any act of a testator by which he shews his intention to cancel his will, though the will be not actually cancelled, operates as a revocation." The jury were distinctly told that unless they found the fraud suggested by the evidence they must give effect to the will. It must therefore be presumed that they did find it. The evidence upon which they gave that verdict however was exceedingly contradictory, and some of it of a questionable character; and it seemed to me at the trial that it preponderated greatly against the conclusion to which the jury came.

It was suggested that the will was revoked by a deed subsequently executed by Carroll, conveying the estate to the defendant. I have looked into the cases cited for and against that position, and am of opinion that there is nothing in it. The case before cited, 2 Vesey Junr. 246, is very material so far as respects the general principle of revocations by sub-

sequent conveyance. The deed in this case being destroyed, we have only parol evidence of its contents, and that evidence exceedingly vague. So far as it can be relied on, it proved the deed not to be a conveyance, but an agreement to convey, and the disposition contemplated is not inconsistent with the will, but decidedly in accordance with it. Such as it was, it was soon repented of by the testator, and destroyed by him, as the defendant's witnesses intimate, expressly in order that the will might subsist as the only disposition of his property until he might think fit to change it. The effect of this verdict, if confirmed, is to change the possession, and therefore I was inclined to think at first that a new trial should be granted upon payment of costs; but on consideration I agree with my brothers, who are disposed not to disturb it. There was certainly some very strong evidence on the side of the verdict by a witness whose character was not impeached. If the defendant be inclined to take the opinion of another jury he may bring his ejectment; his case is plain and simple; he has but to produce the will and prove it by the subscribing witnesses, and then the question of revocation arises for the jury to dispose of; and it is better they should dispose of it without their minds being prejudiced by a judgment of this court expressing disapprobation of the former verdict. (a)

Per Curiam.—Rule discharged.

(a) In *Doe v. Harris*, 6 A. & E. 209, it was held that a will of freehold is not legally revoked if the testator, intending to destroy it, throws it on the fire and another person snatches it off, a corner of the envelope only being burnt, and such person afterwards being urged by the testator to give up the will, promises to burn it, and pretends to have done so.

ROBINET v. LEWIS.

In dower, a suggestion may be entered after final judgment that the husband died seised of lands, and enquiry shall go concerning the damages since that death, though the tenant is the alienee of the heir.

The *Attorney-General* on a former day moved to strike out a suggestion which had been entered on the record in this cause after final judgment of *seisin*—that the husband of the demandant had died seised of certain lands; and also the award of enquiry concerning the damages, on the following grounds:—

1st. That the suggestion should have been entered before, and not after final judgment.

2nd. Because the tenant is the alienee of the heir, and not the heir himself; and damages ought not, therefore, to be assessed against him for the whole term of which the widow has been deforced.

He also objected that the notice of assessment had been served on the attorney in the original suit, when it should have been served on the tenant, as this is in the nature of a new proceeding.

Baldwin shewed cause, contending that this is a continuation of the old proceeding, and the service is therefore good. In answer to the first objection he cited 2 Saund. 45 (in notes), where a similar course had been pursued, and a joint writ of *hab. fac. seis.* and to enquire of the damages had issued. In this case a joint writ could not go, as the sheriff in this province has no authority to enquire, but the record must be taken down to the assizes.

To the 2nd objection he answered, that by the statute of Merton they that be convicted of a wrong-

ful deforcement shall pay damage to the widow of all issues beyond reprises that accrued since the death of the husband, and cited 1 Leon. 56.

Attorney-General in reply.—Having entered final judgment, they are estopped from going further. A joint writ of *hab. fac. seisis.* and of enquiry should have gone. When *seisin* was delivered by the sheriff the suit was at an end. The damages are not the only thing to be enquired of; the jury must find of what lands the husband died seised, and this cannot regularly be done at the assizes.

The, widow in order to be entitled to her damages against the present tenant, who is alienee of the heir at law, should first make a demand. The heir can plead *tout tems prist*, but the alienee cannot, not having been in possession ever since the death of the husband. If the heir plead *tout tems prist*, and it be found for him, the widow can only claim damages from the time of demand—1 Lev. 38. If no demand were necessary, the tenant, however short a time he has been in possession, would have to pay damages from the death of the husband, and would have no remedy against the heir, who if sued might plead *tout tems prist* from the death of the husband to the time of alienation.

After taking time to consider, the judgment of the court was delivered by the CHIEF JUSTICE, and it was decided :—

1st. That the suggestion and enquiry may well be after judgment in the action of dower, as in this case; and besides other authorities, 1 Salk. 252 was cited;

and that the enquiry may be before a judge at the assizes, and not necessarily before the sheriff, as was argued by the *Attorney-General*. Barnes 234 was cited, where damages are stated to have been so assessed.

2d. That the demandant rightly claimed damages *de morte viri*, although the tenant is alienee of the heir, and for this Coke's Inst. and other authorities were cited.

3d. That it appeared doubtful, from what is said in Lev. 409, whether service of notice on the attorney to the tenant in the real action would suffice, inasmuch as his authority to represent the tenant may be considered to have been at an end by the judgment in the original action. However, the court gave no opinion on that point, as they said the objection, if well founded, might be taken hereafter if the tenant thought it worth while to insist on it.

Per Curiam.—Rule discharged.

Regula Generalis.—It is ordered by the court that the process for compelling the appearance of a corporation aggregate in this court shall be by a writ of summons, in the following form :

By the Grace of God, &c.

To the Sheriff of

GREETING.

We command you that you summon the (insert the proper name of the corporation) to appear before us in our court of our Bench at York, on the day of to answer the complaint

of A. B. in a plea of (as the case may be), and have then there this writ.

Witness the Hon. (Chief-Justice or Senior Puisne
Judge of the Court of King's Bench, as the case may
be) this day of
in the year of our Reign.

Which writ shall be served agreeably to the law and practice in England in respect to corporations aggregate; and that if within eight days after the return of such process, the corporation having been duly served therewith shall not have appeared, then it shall be competent to the plaintiff to obtain the process of *distringas*, and to proceed thereon according to the law and practice in England.

Warren Claus, Miles O'Reilly, and James Jessup, Esquires, were called to the bar in this term, and sworn in.

MICHAELMAS TERM, 1 WM. IV., 1830.

Present :

THE HON. JOHN BEVERLEY ROBINSON, Chief-Justice.

“ LEVIUS PETERS SHERWOOD, Judge.

“ JAMES BUCHANAN MACAULAY, Judge.

LEONARD, ESQ., SHERIFF V. GLENDENNAN.

The court refused to order an attorney to pay the costs of a suit on a bond to the limits, he having signed one of the obligors' names thereto, and executed it on his behalf on a mere parol authority.

Dickson moved for a rule calling on D. W. Smith, one of the attorneys of this court, to shew cause why he should not pay the costs of this suit in which the plaintiff had been nonsuited. The action was brought on a bond for the limits. On the trial it appeared that the name of the defendant had been put thereto, and the bond executed in his absence by Mr. Smith as authorised by him. He had only a parol authority, but he stated on the trial when giving evidence as the subscribing witness that he had been directed by the defendant so to do, and thought the execution binding. He did not, however, communicate the fact to the sheriff, nor did it appear that the sheriff was made aware of it till after the action was brought.

But the court refused the rule, and added that before they could grant such an application they would require to be convinced that he had acted *mala fide*, and that when he executed the bond and subscribed his own name as a witness he was aware the execution was null.

Rule *nisi* refused.

MOORE v. JAMES.

Affidavit for issuing a *ca. sa.* containing both the alternatives expressed in the King's Bench Act held good. If an affidavit be sworn by an illiterate person, and the jurat does not state that "he appeared to understand it," it is a fatal objection.

King moved to set aside the *ca. sa.* in this cause on two grounds. 1st. That the affidavit on which it was issued did not state the debt, and that it was made in the alternative, that the defendant has made some secret or fraudulent conveyance of his property, or has parted therewith in order to prevent it being taken in execution. 2nd. That the affidavit appeared to be taken by an illiterate person, but the jurat only stated that "it was first read and explained to him," without adding that he appeared to understand it. Cited 4 T. R. 284.

The court overruled the first objection, deciding that there was no necessity for setting out the debt in this affidavit, and that with respect to the affidavit being in the alternative, it followed the words of the statute 2 Geo. IV., chap. 1, and was good. They, however, considered the second objection fatal, as the rule of court in England was expressed on the point, and had been adopted and formed part of the rules of this court. On this ground the *ca. sa.* was set aside with costs, on the terms of bringing no action.

Rule granted.

HUGILL v. DRISCOLL.

Where the defendant resided in one district, the plaintiff in a second, and a witness in a third, and the defendant was applied to for payment before action brought, which he refused, the court directed the master to tax full costs, although the defendant had confessed judgment after issue joined for a sum within the District Court jurisdiction, which the plaintiff accepted.

The master refused to tax King's Bench costs to the plaintiff (the cognovit being within the jurisdiction of the district court), in compliance with the ninth rule made in Easter Term last.

Small now moved for an order on the master to tax full costs on an affidavit stating that the plaintiff resided in the Home, the defendant in the Newcastle, and a necessary witness in the Niagara District; and further that before this action was commenced application was made to the defendant for payment, who refused, stating his intention to defend. A cognovit was sent to the plaintiff's attorney last assizes.

The court, on the ground that the plaintiff had good reason to expect there would be a defence, and therefore that he might reasonably expect to require the attendance of a witness not residing within the same district court jurisdiction as the defendant,

Granted the rule.

ANONYMOUS.

A rule to return a *fi. fa.* cannot issue out of the office of a deputy clerk of the Crown in an outer district.

The court held that a rule to return a writ of *feri facias* could not issue out of the office of a deputy clerk of the Crown, in an outer district, as the writ itself did not issue out of that office; and the proceedings in the cause, final judgment having been entered, were necessarily in the Crown office at York.

WHITNEY V. STONE AND WELLS, BAIL OF SMITH.

According to the former practice of this court, a bail-piece must be transmitted to a judge of K. B., or it was not regularly put in.

DEBT on recognizance of bail had been brought against the defendants in this cause, and a number of objections were raised on an application to stay the proceedings; but one single point was decided, which went to the foundation of the cause. The original action was instituted in 1812; and special bail was entered for the defendant as of Trinity Term in that year. The bail-piece was filed in the office of the deputy clerk of the Crown in the Johnstown district, but it did not appear that the bail-piece had ever been transmitted to or filed through the intervention of a judge. The *Chief Justice* and *Sherwood, J.*, had both been engaged in this cause when at the bar; and the cause was argued in vacation, at chambers, before *Macaulay, J.*, who this day delivered his opinion on the one point above mentioned.

MACAULAY, J.—By 34 Geo. III., chap. 2, sec. 27, provision is made for the appointment of commissioners to take bail “in such manner and form and by such recognizance as the justices of the Court of King’s Bench might take or thereafter think fit; which said recognizance of bail so taken should be transmitted to any one of the justices of the said court who upon affidavit made of the due taking of the recognizance of such bail by some credible person present at the taking thereof, should receive the same; which recognizance of bail so taken and transmitted should be of the like effect as if the same were taken *de bene esse* before any of the said justices.” A judge of assize on his circuit might take such recog-

nizance of bail, which being transmitted in like manner as aforesaid, the court were authorised to make rule for the justification of such bail.

At present, by 2 Geo. IV., c. 2, sec. 40, commissioners may in like manner be appointed to take bail, and the bail-piece with the affidavit of the due taking thereof shall be filed in the office of the clerk of the Crown in the district where the same shall be taken, and being so filed shall be of like effect as if taken in open court.

In Easter Term, 46 Geo. III. (1806), it was ordered that the practice of this court should conform in all possible respects to that laid down in Tidd and Sellon.

In Easter Term, 60 Geo. III., it was ordered that all recognizances of bail taken by commissioners and transmitted should be delivered in person to one of the judges of this court by the party, his attorney or agent.

The first question is, not whether the omission to transmit the bail-piece would have entitled the plaintiff to treat it as a nullity or to have excepted on that ground, but whether the bail-piece constitutes a recognizance valid in law which the plaintiff might adopt and recognise, or whether by proceeding to declare, &c., he waived the bail altogether.

The provincial statute clearly contemplated the transmission of the bail-piece to a judge, and the rules of court long subsequent to 1812 evince the opinion of the court as to the existence of the practice. They refer also to Tidd and Sellon.

By the practice of the Court of King's Bench in England, bail in town are put in before the court or a judge in chambers or at his house; and prior to the bail attending the judge to enter into the necessary recognizance, an instrument called a bail-piece is prepared, which it is said may be considered the foundation of the recognizance. The condition of the recognizance does not appear as part of the bail-piece, but the judge or his clerk verbally repeat the undertaking, and the acquiescence of the bail is called entering into a recognizance, and their liability as bail immediately commences. It was, however, at an early period ordered that no bail taken before a judge in chambers should bind the plaintiff without his assent thereto or the confirmation of such bail by all the court.—2 Sid. 91. Consequently notice of bail is required, stating names of bail, where to be found, &c.

The rule recited does not affect plaintiff's right at once to acknowledge the sufficiency of the bail. The notice should state before whom the bail was put in, and the plaintiff may accept or except to them, which acceptance may be absolute or by implication. Bail may be entered before commissioners under the statute, but such bail is entered *sub modo*, to become effectual by transmission duly authenticated to a judge. Until transmission the acknowledgment before a commissioner appears to be an inchoate act, and the filing the bail-piece in the district office would not seem to help it (vide Petersdf. 287, *et seq.*) That bail before a commissioner is not considered as put in till transmitted and filed with a judge may be gathered from the following authori-

ties—Imp. Prac. 137; 1 Arch. Pr. 116; 1 Sellon 143, 4; 1 M. & S. 199; 5 B. & A. 704. Rules of K. B. Michs.; 8 Wm. & M.—and that the bail may urge the objection.—1 East. 603.

Upon the best consideration I have been enabled to give this point I arrive at the opinion that the omission to transmit the bail-piece rendered the proceedings a nullity. A bail-piece duly transmitted has only the same validity that would attach to it if entered before the judge who received it. Without the statute no commissioners could have been appointed, and the statute declares how far such commissioners shall be concerned in the perfecting of bail. Whether after the establishment of our district offices the course of transmitting the bail-piece to York was consistent with practice thereby intended is not the enquiry. The statute in England and here merely appoints the commissioners to act as agents of the court or judges, and the authority granted must be pursued. If bail was not effectually entered the bail could not arrest or render their principal. The plaintiff in the suit, it is seen, may waive or exact certain formalities as notice, &c., superadded to the entry of bail; but if the recognizance is not so taken as to be obligatory, his future acts instead of attaching obligation will be regarded as an abandonment of the right to such security. In addition to the above it is in this case to be observed that the affidavit of caption may not have been sworn before a person clothed with competent authority to administer it. It is taken before *Henry Arnold*, deputy clerk of the Crown.

If the bail-piece therefore be a nullity, and such is my opinion, the foundation of the action fails, and it is unnecessary to decide upon any other objections which have been raised.

Rule absolute to stay proceedings.

ATKINS V. THORNTON.

In case for slander the court will not grant a new trial on the ground of the smallness of the damages.

This was an action for a verbal slander. The case was clearly proved at the trial. The defence set up was insanity on the part of the defendant, but no proof was adduced to it. After the jury had retired to consult, and returned into court to deliver their verdict, the judge who tried the cause was applied to to charge them how much was necessary to carry costs, which he declined doing at that stage of the trial. The verdict was then given for one shilling.

Bidwell moved for a rule *nisi* for a new trial, and *Sullivan* argued on the other side.

CHIEF JUSTICE.—I think it quite impossible to grant a new trial in this case consistently with the authorities. It is true that in many cases, perhaps in this particular instance, a plaintiff would sustain less actual injury if a verdict were rendered for defendant. That might arise from a failure of evidence, from conflicting testimony, or because the words complained of were not used in the slanderous manner imputed, or were coupled with such an ex-

planation as would do away with their injurious tendency. But giving one shilling damages shews the slander to have been indisputably proved, while it also shews that the jury thought the plaintiff entitled to no compensation. However, this is a vindictive action. Unless under very special circumstances, the court would not interfere on the ground of outrageous damages, and therefore it is less proper that their interference should be grounded on the plaintiff's complaint that the damages are too small.

SHERWOOD, J.—The court have no standard in actions of this nature by which they can undertake to measure the damages. It is one of those questions which must be left to the sentiment and feeling of the jury who hear the evidence and most probably know both parties. I do not think the smallness of the damages is to be considered as necessarily reflecting on the plaintiff's character. The jury in the first place find the slander untrue, but that the plaintiff sustained little or no injury from it. His accuser, in their estimation, was probably unworthy of credit, or, as was urged at the trial, he was not in his right mind. I quite concur with the learned judge who tried the cause in his refusal to enter into the question of costs under the circumstances of the case.

MACAULAY, J.—I submit to the authority of the cases reported, but not to the reason of them, in refusing a new trial on the ground urged. I think the verdict in this case should have been greater; and if I had supposed when I was giving my charge that the jury would have found as they did, I would

have explained distinctly to them what sum it was necessary for them to give in order to carry costs. After they came in prepared to render their verdict I could not give that explanation. If I could find any authority to support me I would wish to grant a new trial now, but the current of decision is altogether the other way.

Per Curiam.—Rule refused.

SMALL V. MACKENZIE.

If a demand of replication, rejoinder, &c., has been served the party desirous of having further time to reply, rejoin, &c., must obtain a judge's order or rule of court for that purpose.

The court held that parties are bound to reply, rejoin, &c., in eight days after service of a proper demand thereof, and that the proper mode of obtaining further time for that purpose is by rule of court in term time, or by order of judge in vacation; and that a side bar rule does not issue in this case. This decision was grounded on the fourth rule of this court made in Easter Term last.

BEARD V. ORR.

The court refused to discharge a prisoner in execution where the plaintiff died and the weekly allowance was tendered by a person who had usually paid it, although no administration was granted for some time.

The plaintiff in this cause died after the defendant had been charged in execution, and had obtained a rule for his weekly allowance, and received it for a considerable time. The first Monday after the plaintiff's death the allowance was tendered to defendant by the person who had usually paid it, and was re-

fused. The same thing took place for two or three weeks ensuing, when administration was taken to plaintiff's estate. An application was made to discharge defendant out of custody on the ground that these tenders of payment were ineffectual, not having been made by a person duly authorised, or having any privity to the plaintiff's estate. That they were to be viewed as no tender, being made by a mere stranger, and defendant was therefore entitled to his discharge, and 1 B. & P. 366, 176; 1 N. R. 306; 2 N. R. 240; Barnes 366, were cited.

The court said it might be urged with great shew of reason that the provincial statute being silent with regard to the payments being made by the executors or administrators of a deceased plaintiff, some other person might do it on behalf of the estate, In the cases cited there had been a great delay. The plaintiffs in two cases had been dead more than a year, and then there was neither executor nor administrator, nor had any payment been made. Even if in this case no payment had been made between the death of the plaintiff and the granting administration, there having been no unreasonable delay, it might be questioned if the defendant would have been entitled to his discharge.

Rule refused.

Draper for plaintiff. *Ridout* for defendant.

DRUMMOND V. BRADLEY.

Under a bill of particulars for work and labour, plaintiff may give in evidence an acknowledgment of a specific balance due for work and labour.

ASSUMPSIT for work and labour and the money counts with an account stated. Plea non-assumpsit and notice of set-off. The plaintiff had delivered a particular of his demand under a judge's order, which was for painting and glazing only. At the trial the plaintiff proved that the defendant had acknowledged himself indebted to the plaintiff in a certain sum, and said it was for painting and glazing, but without any reference to the items. The defendant's counsel objected to this evidence being received, and contended that the plaintiff was tied down by his bill of particulars, and could not give a general acknowledgment of a debt due in evidence, but must prove the items of his account as delivered.

The *Chief Justice* who tried the cause allowed the evidence to go to the jury, with leave to the defendant to move the objection.

King now moved a rule *nisi* to set aside the verdict which had been rendered for the plaintiff, and to enter a nonsuit on the objection, and cited several authorities. But after consideration the court thought that the authorities, particularly the modern ones, shewed this evidence was properly received, and mentioned the following cases: 2 B. & P. 243; 2 C. & P. 267; 1 Stark 224; 3 M. & S. 380; 1 Camp. 69; 4 Taunt. 189; 2 B. & B. 682; 5 Moore 567; 4 Esp. 147. They therefore refused the rule.

RUGGLES v. BEIKIE, Esq.

In an action against a sheriff for the overplus of money levied under an execution, the plaintiff must prove a demand of the money before action brought.

A judgment had been recovered against the executrix of plaintiff's father for a debt contracted by him, under which, after a *fi. fa.* against goods, a *fi. fa.* issued against the lands and tenements of the deceased in the hands of his executrix. Lands were sold for a sum considerably exceeding the amount endorsed to be levied. Some years after the sale the present plaintiff brought an ejectment for the lands so sold as heir at law to the deceased, and recovered possession. Prior to that an application was made by the executrix to order the sheriff to pay over the overplus of the levy to her, which the court refused, on the ground that as the land would have descended to the heir the proceeds of it were his. Another ejectment was subsequently brought by the purchaser at the sheriff's sale against the heir, and a verdict was taken for the plaintiff subject to points reserved.

Before the ensuing term the parties compromised. The heir gave security to the purchaser to repay him the money he had advanced, and he released all his right and title to the heir; and now this action was brought against the sheriff by the heir to recover that surplus. At the trial the plaintiff was nonsuited for not proving a demand upon the sheriff before action brought, and it was at the same time urged that in no event could the plaintiff recover. If the sale were invalid, then the purchaser, not the heir, should have the money. If the sale were valid, then the proceeds, after satisfying the execution, should go to the executrix.

In this term *Small* moved to set aside the nonsuit, alleging that no demand was necessary, and no case could be adduced to shew that it was requisite.

Attorney-General, contra, cited 2 B. & C. 684; 3 B. & A. 696.

CHIEF-JUSTICE.—I certainly think a demand necessary, particularly when the sheriff is called upon to pay the money, not to the original defendant but to a third person, who alleges that he is entitled to it as heir. It was asserted that an indemnity had been offered to the sheriff, but a court of law cannot enforce payment on that ground. If, indeed, it had been shewn to the sheriff that all persons who could have a claim had released that claim to the present plaintiff there might have been more reason for calling on the sheriff, though it would remain a question whether the heir has a right to the money.

SHERWOOD, J., thought a demand necessary.

MACAULAY, J., agreed as to the demand. As to whether this action is sustainable or not I give no opinion.

In answer to *Small*, who urged that the plaintiff would be barred by the Statute of Limitations if a new trial was not granted, it was intimated, though no opinion was actually given, that the sheriff could not avail himself of the statute in a case like the present.

Per Curiam.—Rule refused.

CAVAN V. WELSH.

The plaintiff may bring either trespass or case for seduction.

CASE for seduction and verdict for the plaintiff. *Bethune* moved in arrest of judgment that the plaintiff had misconceived her remedy, and that trespass, not case, was the proper form of action. Cited 2 N. R. 476; 2 T. R. 167.

The court, however, after considering the following authorities—2 M. & S. 436; 3 Burr. 1878; 3 Wils. 18; Peake N. P. 55, 240; Cowp. 54; Lofft. 493; 6 Esp. 32; 3 Camp. 420; 5 Ea. 45; 2 Chit. Rep. 260; 11 Ea. 23; Holt. N. P. C. 451; 6 Ea. 388, 251; Bull, N. P. 28; 2 Stark, N. P. C. 493; 3 Wils. 319—thought either form of action good; and MACAULAY, J., mentioned the case of *Smith v. Book*, decided in this Court in Michs. 3 Geo. IV., where it was so held.

Per Curiam.—Rule refused.

William Wallace and *James Hubbel*, Esquires, were called to the bar and sworn in this term.

HILARY TERM, 1 WM. IV., 1830.

Present :

THE HON. JOHN BEVERLEY ROBINSON, Chief Justice.

„ LEVIUS PETERS SHERWOOD, Judge.

„ JAMES BUCHANAN MACAULAY, Judge.

IVES v. HITCHCOCK.

Trespass for taking, impounding, and selling plaintiff's horses. Pleas.—That horses were damage feasant. Replication.—That by town meeting regulations fences should be five feet high, and that defendant's fences not being that height, but ruinous and out of repair, plaintiff's horses escaped out of his close into defendant's close, and without the knowledge and consent of plaintiff. *Held* good on general demurrer.

TRESPASS for taking and selling plaintiff's horses. Pleas, 1st—The general issue. 2nd plea to the first count—That defendant distrained the horses damage feasant; that the damages were assessed by three freeholders (according to the provincial statute 43 Geo. III., ch. 10), and that those damages and the pound-keeper's fees being unpaid, the pound-keeper, at the request of defendant, sold the horses according to the statute. 3rd plea to the first count—That the horses, with the knowledge and consent of plaintiff, where damage feasant in defendant's close, whereupon defendant impounded them; that damages were assessed according to the statute; that those damages and pound-keeper's fees being unpaid, the pound-keeper at defendant's request sold them according to the statute; that plaintiff demanded the surplus, which defendant paid, and plaintiff accepted the same. 4th plea to first count—That the horses,

with the knowledge and consent of plaintiff, were doing damage, wherefore defendant took and impounded them as he lawfully might.

Replication to 2nd plea.—That plaintiff is possessed of a close contiguous and adjoining to defendant's close; that the inhabitants of the township did, at their annual town meeting in 1828, ascertain and determine that fences on Wolfe Island should be five feet high, and that horses should be allowed to run at large; that his (plaintiff's) horses were depasturing in his close as they lawfully might, and because the fences of the close of defendant contiguous were not of sufficient height, to wit, of the height of five feet, and were ruinous, broken down, prostrated, and in general decay for want of needful and necessary repairs, &c., his horses escaped out of his close into the close of defendant through the defects and defaults of the said fences, and remained there till the said defendant of his own wrong took the horses, and drove away and impounded them, &c.

Replication to 3rd plea.—Plaintiff's possession of the contiguous close; town meeting regulations as to fences, &c., as in last replication; that the fences of the close of the defendant were out of repair; that the horses of the plaintiff, without his knowledge and consent, escaped out of his close into the close of the defendant through the defects of the fences afore-said; that defendant took them and impounded and sold them, and converted the moneys to his own use, with the exception of the surplus, &c., as in the plea mentioned.

Replication to 4th plea the same as to the 3rd

plea, omitting the statement as to selling, &c., the third plea extending only to the impounding.

Rejoinder to replication to the second plea merely takes issue on the sufficiency of the fences, asserts that they were five feet high, and were not ruinous, broken down, prostrate, or in great decay, &c.

General demurrer to the replication to the third and fourth pleas.

The cause was tried on the issue in fact at the last assizes for the Midland District, and the jury found a verdict for the plaintiff.

The cause was argued last term by the *Solicitor-General* in support of the demurrer, and *McKenzie*, *contra*.

CHIEF-JUSTICE.—We are not familiar in practice with the laws respecting distress of cattle damage feasant, and I have found it necessary to examine it step by step. There remains no doubt whatever in my mind that if we could leave out of view all our provincial statutes and judge of this case by the common law of England the replication must be pronounced bad, and judgment must be for the defendant on this demurrer. The question would then stand thus. Hitchcock is not bound of common right to fence his close against the cattle of Ives. If it were possible that he could in this province be bound by prescription, it is not stated in the replication that he was so bound, or that he was bound in any manner to repair. On the other hand, Ives is bound to keep his cattle from trespassing on his neighbour,

and therefore as the act of trespass is admitted in the replication, and is not justified by throwing on the defendant the *onus* of repairing, judgment upon such a case and such pleadings in England must be given for the defendant.

As all the authorities agree in this it is scarcely necessary that I should refer to them. In Com. Dig. Pleader M. 2; Cro. Jack. 665; 1 Salk. 335, 360; Fitz. Nat. brev. and 1 Taunt. 529, this law is clearly stated, and the case in Cro. Jac. clearly shews that an obligation to repair is not inferred merely because the whole of the fence is on defendant's land, as it appears to be in this case from the language of the pleadings.

But we are not left to decide this question by the law of England; we must consider how it is affected by our statutes, of which there are several bearing on the subject, and in which the legislature have clearly interposed to qualify or restrain the remedy of distress. It must be exercised subject to these restrictions.

“The right of distress, damage feasant” (as stated by Lord *Mansfield*, Cowp. 414), “depends upon a peculiar system of positive law. Distraining cattle doing damage is a summary execution in the first instance.” The distrainer must take care to be formally right. It is necessary therefore to consider whether this distress can be supported by our statutes. The first statute bearing on this subject is 33 Geo. III., ch. 2, which declares that the pound-keeper of each township is “authorised to impound

all horses, cattle, &c., that shall trespass on the lands of any person having enclosed the same by such high and sufficient fence as shall have been agreed on by the inhabitants at their annual town meeting." The next is 34 Geo. III., ch. 8, which enacts, "that horses shall not run at large otherwise than under the regulations and restrictions contained in that statute ; that the inhabitant householders shall at their annual town meetings determine in what manner and at what periods horses shall be allowed to run at large, or to resolve that they shall be restrained from so doing ; and further, that if any horse shall be found running at large contrary to such town meeting regulation, any of the pound-keepers may impound such horse so trespassing, and detain him until satisfaction and payment of fees," &c. The next statute is 43 Geo. III., ch. 10, which declares that "any horse taken damage feasant or running at large contrary to law shall be impounded and sold," and it is under this act that the defendant professes in his plea to have proceeded in disposing of the distress.

Taking these statutes together, as they must be taken, for the purpose of construction, being in *pari materia*, I discern no other intention in the legislature than this—that if horses are allowed by their owners to run at large, when by the town meeting regulations they ought not, they may be impounded and sold as a distress damage feasant, at the instance of anyone on whom they are found trespassing, and this whether the field in which they are trespassing be enclosed by a sufficient fence or not. But that if horses are by the town meeting regulations allowed to run, then they cannot be impounded and sold as

a distress damage feasant, unless in the words of the first statute they are found trespassing on the lands of some person "having enclosed the same by such high and sufficient fence as shall have been agreed on by the inhabitants at their annual town meeting."

This provision is adapted to the actual state of the province now, and still more when these statutes were passed, all which the legislature must be supposed to have had in view. People had in general but a portion of their lands enclosed, the part that was uncleared commonly lay open, but it was nevertheless useful to them, that their cattle should be able to run in it and glean sustenance from the woods. If, however, they were to be subject to have their cattle impounded whenever they passed from their woods into woods of their neighbours, or even into their neighbours' field, which might often be imperfectly enclosed, it is clear they could not venture to avail themselves of this use of their unenclosed lands. For the general convenience, therefore, the law was put on this footing by the earliest of our statutes, viz.: "that cattle were to be impounded only when they trespassed upon lands sufficiently enclosed," and as this seemed to imply a general indemnity against being impounded, unless when they broke into enclosures of lawful height, which arrangement might not suit all parts of the country equally, if it was thought expedient to allow this matter to be regulated by the wishes of the inhabitants of each township. They were therefore empowered to determine in the several townships whether their cattle should run at large or not; and whenever they restrained them by law, then cattle so running at large

illegally, and doing damage, were liable to be impounded without enquiry as to the sufficiency of fences.

Now it is admitted on these pleadings that at the place and time in question these horses were allowed to run at large. If, therefore, plaintiff's horses had escaped from his close into the highway, and had from thence broken into defendant's close, there would, in my opinion, have been no right to impound them unless the close was surrounded with what, in reference to the town meeting regulations, is usually called a lawful fence; but when the plaintiff's horses were in his own close they were there at least as much of right as they could have been in the highway; they committed no wrong till they actually broke into the defendant's close, and that wrong could not under our statute law subject them to be impounded unless there was a lawful fence surrounding the close. The owner of the horses might perhaps be subject to an action of trespass, however defective the fences might be, and in England, even where the repair of the fences is the duty of the party trespassed upon, cattle may be impounded notwithstanding defect of fences if the owner allow them to continue trespassers after notice. Whether the same principle would under the circumstances apply here it is not necessary to consider, because it is expressly stated in the replication and admitted by the demurrer that the plaintiff's cattle escaped *without his knowledge and consent*. The case in Dyer, 317, 318, bears strongly on the question. "Two men being severally seised of two closes adjoining together, and the enclosure and fence between the closes belonging all to one of them,

by prescription, the cattle of the other by a defect of fence escaped out of his close into the other, and immediately before the owner of the beasts could drive them into his own close the lord distrained them for services. Whether he could do so was the point on demurrer, and was adjudged for the plaintiff, and against the defendant, for no default can be assigned in the owner of the beasts for this escape, *nor does any law oblige him to keep his cattle in his own close.*"

On the whole, I am of opinion that the taking in order to impound, as well as the impounding and selling, were not warranted by the laws of this province upon the case disclosed in the replication, and as the taking is the very substance of the trespass which the plea attempts to justify, and was, I think, wholly illegal, I am against the demurrer.

SHERWOOD, J., concurred.

MACAULAY, J.—The question in this case, though I have found much difficulty in its solution, lies within a very narrow compass. The plaintiff in his replication, after stating that by the township regulations fences were required to be five feet high, and that cattle were allowed to run at large, says he was possessed of a close contiguous to and next adjoining a close of defendant; that being so possessed his horses were depasturing therein as they lawfully might, and owing to defendant's fence being ruinous and not five feet high, they escaped through such defect.

The defendant demurred, on the ground that plain-

tiff has not shewn that it was incumbent upon him to protect his close by any fence.

Did the case rest upon the laws of England alone, the replication would doubtless be insufficient, no one being thereby bound to fence against his neighbours' cattle unless by prescription or other special obligation. The provincial statutes seem to infringe this rule, and the matter turns upon their construction. The ordinance of the province of Quebec, 17 Geo. III., ch. 11, which provided for the repair of high roads, and required the fields to be fenced off from such high roads by the owners, and which prohibited horses from running on the high roads, was repealed by the provincial statute 33 Geo. III., ch. 4, passed at the same time with the statute 33 Geo. III., ch. 2, hereafter mentioned; and although the repealing statute, ch. 4, was itself afterwards repealed by 50 Geo. III., ch. 1, I do not think the ordinance revived, other provision being substituted.

It appears also by reference to ordinance 30 Geo. III., ch. 4, that at the time of the division of the province of Quebec cattle were not allowed to run at large, though the custom or usage has been recognised by our provincial legislature as prevailing in Upper Canada, so much so that if important to the present case I think the court would be constrained to assume that such usage continued to obtain when 33 Geo. III., ch. 2, became a law. Owing to the repeal of the ordinance 17 Geo. III. the former regulations respecting fences ceased, and in lieu thereof the provisions contained in ch. 2 were introduced.

By this act the overseers of highways were appointed fence-viewers, with authority to determine upon the sufficiency of any fences within their limits conformably to the regulations established at the town meetings. This act also provided for the nomination of pound-keepers, with authority to impound cattle that should trespass on the lands of any person having enclosed the same by such high and sufficient fence as should have been agreed upon as aforesaid, and also to impound any stud horses that should be found running at large upon the highways or commons, &c. Considering how the law stood at the period of this act in relation to fences, pounds, and pound-keepers, it would seem that the statute engrafted its provisions upon a previous law, but that in these respects it was introductory of new and independent regulations, on which account those portions that in their language are merely affirmative may acquire a force in construction equivalent to negative terms; and I incline to adopt the opinion that the sixth section, authorising pound-keepers to impound cattle trespassing on the lands of any person having enclosed the same, &c., implies negatively that cattle are not to be impounded for trespassing unless the owner shall have so enclosed his lands, &c. Such I believe to have been the contemporaneous construction and the received sense of the enactment ever since. This interpretation is, I believe, susceptible of universal application consistently with the principles of common law applicable to the subject, and amongst others, to the maxim that the owner of cattle distrained damage feasant cannot maintain trespass against the owner of the close in which, &c., unless he can shew not only that

the obligation to fence was upon the latter, but that the cattle escaped from a place in which they were lawfully depasturing or being. 2 H. B. 528 ; 3 Wils. 126.

The provincial statute already mentioned implies that no one shall impound cattle unless his close be fenced, and that the inhabitants at the annual town meeting are to determine, not whether fences are to be erected or not, but merely the sufficiency of the fences required by law. The obligation to fence seems general, and applies as well to the cattle of individual neighbours as to cattle running at large or legally passing along the public roads.

The Act 34 Geo. III., c. 8, abrogates the usage or custom of suffering cattle to run at large unless under the sanction of the township regulations ; and I for a long time thought the obligation to fence depended upon the usage mentioned, but reflection has convinced me it does not. If cattle running at large contrary to the regulations be distrained damage feasant by a person not having a sufficient fence, the owner could not maintain trespass, for he would be unable to shew that they escaped from a place in which they lawfully were ; but if cattle, allowed to run at large and enjoying such easement, or lawfully passing along the highway, though restricted from running at large or lawfully depasturing in an adjacent field, should err into the field of any individual, the occupier could not distrain unless his land were enclosed by a sufficient fence, because the owner of the cattle might in such instances avail himself of the preventive duty imposed upon the party injured.

Should the above views be correct, then the replication is sufficient, for the obligation to fence being a general law under the statutes, the court is bound to notice it, and the plaintiff has shewn the other circumstances necessary to concur in order to entitle him to urge its omission—namely, what description of fence the regulations required, the insufficiency of the defendant's fence, and that by reason thereof the horses escaped from a close in which they were lawfully depasturing into the defendant's adjoining land.

I have experienced no little difficulty in making up my mind upon this demurrer, and cannot say I am yet perfectly free from doubt. It struck me at first that the onus of fencing was only designed to extend to cattle running at large, without interfering with the common law rights and duties of individuals in relation to private contiguous closes or to cattle depasturing therein, and that if the right of distress was not restricted when cattle so at large erred from a place in which they were in the lawful enjoyment of such easement into a close not defended by a sufficient fence, it would have been incumbent on the plaintiff in a suit like the present to have averred that his horses were running at large at the time they escaped into defendant's field: in other words, that they were participating in a privilege out of which a protection arose not afforded under any other circumstances. It did not occur to me that because cattle might be allowed to run at large it was to be intended or presumed that all cattle taken damage feasant were running at large. On the contrary, I was disposed to think it was a matter of fact (susceptible in some cases of being traversed) whether

or not cattle were running at large. I cannot admit that cattle feeding in the owner's enclosure or shut up in his stable could be held running at large within the meaning of the usage and the law, whenever they might happen to escape from such stable or enclosure into the neighbouring grounds. And had I come to the conclusion that defect of fences could only be urged in favour of cattle lawfully running at large I should not have been prepared to uphold the replication; indeed I should rather have deemed it substantially defective. But since the best interpretation I have been able to give to the statute leads me to believe that it was not intended to allow anyone to distrain, impound, and sell cattle (the latter not lawful in England) for trespassing and doing damage unless his lands were enclosed with such a fence as the township regulations prescribed, provided the cattle erred from any place wherein they were lawfully grazing or roaming, and not trespassing, I am relieved from the necessity of expressing a positive opinion upon a point that engaged (I now believe) unnecessarily much of my attention.

After, all I cannot say I am perfectly free from doubts as to the proper construction and application of our provincial statutes, but, as at present advised, I am disposed to think the replication sufficient for the reasons I have assigned.

Per Curiam.—Judgment against the demurrer.

ROBINETT (Demandant) v. LEWIS (Tenant). (a)

After judgment of *seisin* in dower on a writ of enquiry, the mesne value of the premises between the death of the husband and the obtaining judgment should be assessed. Demandant may also assess as damages her taxable costs on obtaining judgment of *seisin*—executing the writ of *hab. fac. seisinam*, and her necessary travelling expenses incurred in prosecuting the suit.

Demandant's residence on the premises, in the family, and at the expense of the heir-at-law for part of the time between the death of her husband and her recovering judgment is not admissible in evidence as a set-off to her damages for the detention, though proper to go to the jury in mitigation.

In this case, after judgment for the demandant in an action of dower *unde nihil habet*, a writ to assess damages for the detention of the dower, according to the statute of Merton, was issued. It was proved at the assizes that Allan Robinett, husband of the demandant, died on the fifteenth April 1813, seised of two hundred acres of land in the township of Toronto, in the Home district; that at the time of his death about eighty acres of the land were cleared, and capable of being cultivated, and there were on the land one house of wood, one barn, an orchard just beginning to bear, &c.; and altogether it was estimated that the premises were then worth by the year £20, above taxes, &c.; that at the time of judgment of *seisin* being rendered in the action of dower, viz., 19th April 1830, there were 120 acres of the 200 cleared of wood and fit for cultivation, two dwelling-houses, two barns, two orchards, and that the value of the premises by the year was £30. Some evidence was also given as to a mill for grinding tanner's bark having been erected after the husband's death, and removed before dower assigned. It was also proved that until the last three years the demandant resided on the premises with the heir-at-law, unmolested, not receiving the rents

or profits, but supported upon it. Some evidence was also given of trouble and expense incurred by the demandant beyond taxed costs in prosecuting her action of dower, and several questions having been proposed and debated at the enquiry, it was at length agreed to take a verdict, finding that the husband of demandant died 15th April 1813, seised of the premises specified; that seventeen years have elapsed since the death of the said Allan Robinett; that the said tenements with the appurtenances are worth by the year, in all issues beyond reprises, thirty pounds, subject to be reduced, according to the opinion of the court, upon points reserved upon the judge's notes; and that the said Rachael Robinett hath sustained damages as well by occasion of the detention of her dower beyond the said value as for her costs and charges by her expended about her suit in that behalf, to £34, 4s., subject also to be reduced according to the opinion of this court upon other points reserved upon the judge's notes.

The jury also found forty shillings costs.

The points upon which the judgment of the court was required are—

1st. Whether the jury in finding the annual value of the premises ought by law to have found the yearly value thereof as at the time of the death of demandant's husband, or as at the time of the judgment of seisin, or whether they ought to have found the average yearly value, taking one year with another, from such death to the judgment.

If the first, then it is agreed that the verdict shall

stand at thirty pounds; if the second, to be reduced to twenty pounds; and if the last, to be entered for twenty-five pounds. 2nd.—Whether by law the demandant is entitled to recover as damages for the detention of her dower any and which of the following items, viz. :

- I. £22 10s. 10d.—The actual costs and expenses in obtaining judgment of seisin.
- II. £0 17 6.—The sheriff's fees on executing the writ of *habere facias seisinam*.
- III. £1 0 0.—The fees of a witness produced on her behalf upon the trial, and not included in the first item.
- IV. £1 10 0.—Her actual expenses on two trips to York to see her attorney upon the necessary business of her suit.
- V. £5 0 0.—A payment made by her to an agent (not a professional man) in York, employed to communicate between her and her attorney, she being advanced in life and infirm, and unable to attend to it herself.
- VI. £0 5 0.—The amount of the loss which she sustained by the removal of a tan bark mill erected on the premises after her husband's death, and removed before the recovery of the judgment of seisin.

VII. £3, 8s. 8d.—Her costs in the rule to arrest the judgment (in the action of dower) which was discharged with costs.

3rd.—Whether the jury could by law upon this record find that although seventeen years had elapsed from the time of the death of demandant's husband to the judgment of seizin, yet that the demandant had actually been residing on the premises with her son, the heir at law, and in his family, during fourteen years of that period, and had been actually deprived of support from the premises for only three years. If the court are of opinion that the jury could have found such facts upon this record, then the verdict to be altered by such finding.

This case was argued in Michaelmas Term by *Baldwin*, for the demandant, and the *Attorney-General* for the tenant.

Judgment was this day given as follows:—

CHIEF JUSTICE.—(After stating the case as above.) As we have not the advantage of a Court of Equity in this province, the demandant has been driven to seek her remedy by a legal proceeding not now very common in England, and almost without a precedent here. It is not, however, in its nature difficult or complicated, and if it is not convenient in its application throughout, or not well suited in some of its principles to the circumstances of this country, it must rest with the legislature to make any alteration that may be thought expedient. At present the demandant can only follow her remedy, and the court can only give it in strict accordance with the laws of England.

It was stated in argument to be much desired that in this case certain rules might be laid down which might serve as a direction in the many cases of dower which are likely to follow. So far as the decision of this court upon the case before it may be acquiesced in as an authority in other cases under similar circumstances, that advantage will of course be obtained, but I am unwilling to travel out of this case in order to lay down any general principles that do not necessarily come in question.

Upon the subject of dower (or rather I mean the legal remedy for dower) the cases are not numerous, and many of them are not very satisfactorily reported. What is said by text writers turns chiefly upon what is laid down in *Coke* and *Perkins*. These authors differ on one very material point, namely, the effect that improvements made by the heir shall have in their assignment of dower; and it is observed of *Perkins* that he is not quite consistent with himself. After examining all that I can find on this head, I find it so difficult to come to any clear general conclusion which can be shewn to be borne out by incontrovertible authority, that I think it would be in some measure assuming the power to legislate on the subject if the court were to attempt to fix what they cannot shew to have been clearly settled by former adjudications. I see there is room for discussion when the facts shall in a small degree vary from those before us, and we should not prejudice future cases where rights of much greater value may be involved by any doctrine laid down extra-judicially now.

With respect to the points submitted to us in this

verdict I am of opinion that the mean value or twenty-five pounds per annum is that which should have been assessed in this case. I do not mean to say that some items may not have entered into this estimate of the annual value which a nice calculation on legal principles would have rejected. But it is that one of the three modes of valuation proposed which is most consistent with legal principles. The value at the time of the death of the husband I consider not to be the just criterion. It might in some cases afford a nominal compensation for a real injury, and it is easy to conceive other cases in which, from a subsequent depreciation in the value of property from local circumstances, a valuation taken at the death of the husband continued through a course of years would be ruinously excessive. The value of the property at the time of dower assigned, for similar reasons, I am convinced is not to be taken for the proper annual value, as of course.

The statute of Merton (20 H. 3, ch. 1), says, that widows shall recover the "value of the whole dower to them belonging, from the time of their husband's death unto the day that the said widows, by judgment of the court, have recovered seisin of the dower." The entries in *Rastal* are not in accordance with this, for there the writ runs to enquire "*quantum prædicta tenementa, &c., valent,*" &c., which direction refers to the present value. The words of the statute, however, and its evident intention, as well as the reason of the thing itself, all demonstrate that the value the widow has lost is what she is to recover. This can no otherwise be done than by computing the value throughout the period of that

of which she ought to have been endowed; and if, for sake of form, the computation must in the entry of the judgment be founded upon an annual value, that annual value must upon such a principle be deduced from the whole upon a calculation of average, as the twenty-five pounds has been in the case before us.

It appears that when the damages have been assessed for the whole period in one gross sum the court have sustained it, and this seems rather to confirm a construction which I am clear is the right one.

What particular improvements made by the heir or his alienee ought to be allowed for or excluded in computing the value does not specifically come before us in the case reserved, and we could not attempt to go into it without deciding from estimates that are admitted by consent.—Questions of that nature are those which it is of most importance to settle and they are unfortunately those which upon the English authorities are most unsettled.

Next, with respect to the items which may enter into the estimate of damages for the detention of dower, I think Nos. I., II., III., IV., & VII., might legally have been allowed by the jury, and that their allowance would have been proper. No. V. I think ought not to have been assessed, though I cannot say that in assessing it the jury would have acted illegally. In the exercise of a sound discretion I think they should reject it. No. VI. is not properly classed, as connected with this second point submit-

ted to the court. I am of opinion that for such improvement added and removed between the death of the husband and the judgment of seisin no damages should have been computed.

Upon the third point submitted to us I am of opinion that the fourteen years during which the widow was suffered to reside on the premises with the heir-at-law, not receiving the rents or profits, or managing the estate, but merely supported on and from the premises, could not by the jury have been legally considered as fourteen years during which the demandant's claim to damages was barred, the one being by no means necessarily equivalent to the other, but that the jury might and ought to have considered that evidence in estimating the damages for the detention of the dower, because it clearly reduced her claim.

SHERWOOD, J., on account of indisposition gave no opinion.

MACAULAY, J.—Upon the evidence offered at the inquest under the venire in this record I am of opinion that the verdict of the jury should be compounded of the average yearly value beyond reprises, reckoned from the death of the demandant's husband to the period of recovery and seisin of dower. But I am not to be understood as establishing any general rule, for under a different state of facts it might be proper for the jury to govern themselves by other data or to adopt a different criterion. The average value I gather from the case to have been £25 beyond reprises.

I think the demandant is entitled to recover in the

shape of damages for the detention of her dower the following items :—Nos. I. II. III. IV. & VII., but not Nos. V. & VI. I think the costs of the cause may, if desired, be recovered as damages after taxation, or that they might have been allowed by the court under the statute of Gloucester and our provincial statutes as attending a recovery of damages in the suit. The demandant having employed a professional agent, I think proof of the fourth item properly left to the jury ; but being allowed the expenses incurred in attending him, I do not think she can legally claim the fifth item. A professional agent being instructed and allowed his full costs, I do not think the defendant in this cause liable to reimburse any fees paid to another agent, not professional, whose employment does not seem to me to have been indispensable. I do not perceive the absolute necessity of a second agent in York, however convenient, and I think the damages should be restricted to the one only. Not deeming the demandant in dower entitled to recover in damages any profit or advantage accruing by reason of improvements made by the heir or his alienee after the death of the husband, I do not think she can legally exact anything in consequence of the removal of the bark mill as stated.

I do not think that the residence of the demandant on the premises as an inmate with the family of the heir can afford subject of set-off in reduction of the demand for annual value during the period, but that such matter would be properly admissible in mitigation of damages for the detention of the dower claimed independently of and in addition to the yearly value.

FALLS V. LEWIS.

Where a cause was called on at *nisi prius*, neither counsel or attorney for plaintiff appearing, a jury was called, and plaintiff nonsuited. The court refused to set aside this nonsuit except on terms of the plaintiff's paying the costs.

This cause had been entered for trial at the last assizes for the Home District. When called on the plaintiff's counsel and attorney were absent. The defendant appearing, a jury was sworn, and the plaintiff nonsuited; and last term the *Attorney-General* moved to set aside the nonsuit.

The court were of opinion that the nonsuit was correct, but that it might be set aside on payment of costs—which was done, the defendant's attorney agreeing to accept the disbursements.

The following cases were cited:—2 Campb. 487; 3 Taunt. 225; 1 Wils. 300; 1 B. & C. 110; 1 Archb. Pr. 189; 3 Taunt. 484; 3 B. & A. 328; 5 B. & A. 907; 2 Chit. Rep. 269; 1 C. & P. 46; 2 C. & P. 85; 1 Str. 267; 1 Price, 1.

Nonsuit set aside on payment of cost.

MULGREW V. PRINGLE.

A. agrees to pay B. for a lot of land upon receiving a deed. B. offers a deed, when A. declares his inability to pay, and proposes new terms, which were accepted. Held that B. was thereby relieved from the necessity of tendering a deed to entitle him to sue A. or rescind the contract. That B. was at liberty to rescind the contract, and might do so by parole; and that an agreement in writing within the Statute of Frauds might be waived, discharged, and determined by a subsequent verbal agreement. Qu. ? Whether before or after the breach of the agreement?

TRESPASS.—The first count in the declaration was for breaking and entering plaintiff's dwelling-house, being on part of 150 acres of lot No. 6, 3rd concession Loughborough, making a great noise therein,

and staying thirty-five days; breaking doors, &c.; taking and carrying away goods, &c.; and converting them, &c.; by means whereof the plaintiff was disturbed in his possession.

Pleas.—1st. General issue. 2nd. *Liberum tenementum*, and removal of goods incumbering defendant's freehold. Replication.—1st. *Precludi non*; because plaintiff says that while the said house was the freehold of defendant, ss. 21st November 1826, by agreement in writing between plaintiff and defendant, defendant bound himself to furnish plaintiff with a good and sufficient deed for said house; in consideration whereof plaintiff bound himself to pay to defendant, at the time said deed should be given, \$100, and \$100 yearly for the space of five years next ensuing, by virtue whereof, at the request and direction of defendant, plaintiff entered into the said house, and became possessed, and so continued possessed till defendant afterwards, and while the said agreement was in full force, to wit, at the same time when, &c., of his own wrong, &c., committed the trespasses, &c.

2nd. *Precludi non*; because while said house was the freehold of defendant, ss. 21st November 1826, by agreement in writing between the parties, defendant promised and agreed to sell to the plaintiff her said house, and defendant bound himself to deliver and furnish plaintiff with a good and sufficient deed, &c., as in the last replication to the end. Rejoinder to 1st replication—*actio non*; because after making the said agreement, and before plaintiff had performed anything on his part, ss. 1st June 1828, defendant

was ready, and offered and proposed to plaintiff to perform everything on defendant's part, but plaintiff neglected and refused to pay the said sum of £25, or any part thereof, or to perform any part of the said agreement on his part. Whereupon it was agreed that the said agreement should be, and it was then and there discharged, waived, determined, and at an end. And it was thereupon agreed that plaintiff should pay defendant £12, 10s., and that plaintiff should be permitted to occupy and enjoy said house and premises for one year next ensuing; and that if plaintiff should, during the said term of one year, pay the defendant the further sum of £37, 10s. defendant would sell and convey to plaintiff the said house and premises for £150; but if plaintiff should not do so, he should at the end of the said year quit said house, &c., and defendant should be at liberty to re-enter and have possession thereof, without the hindrance of plaintiff; and defendant agreed to accept the said sum of £12, 10s. and to permit him to occupy, &c.; and although plaintiff enjoyed the house a year, he failed to pay the £37, 10s., but neglected and refused, whereupon defendant peaceably and quietly entered as he might.

Rejoinder to 2nd replication.—Similar to the last. Special demurrer to 1st rejoinder for duplicity,—that two agreements are mentioned and admitted, and two breaches alleged and pleaded in bar, and that the rejoinder contains several matters of defence, and plaintiff cannot take or offer issue thereon, and that defendant does not state that he tendered and offered a good and sufficient deed of said house, &c., and that defendant does not shew the first agreement dis-

charged by any writing or deed. Surrejoinder to second rejoinder, *precludi non*, because the said agreement was not discharged, waived, determined, and at an end *modo et forma*, &c., concluding to the country.

2nd count of the declaration.—That defendant *vi et armis*, ss. 28th May 1830, broke and entered another house of plaintiff, situate, &c., as before, and expelled plaintiff, and kept him expelled thirty-five days, whereby, &c.

3rd count.—That defendant, *vi et armis*, ss. 28th May 1830, and divers other days before suit, broke and entered divers ss. three closes of plaintiff, situate, &c., and broke gates, trod down grass, depastured with cattle, cut trees, also placed a plough, a cart, a harrow, &c., on said closes, and encumbered the same thirty-five days, &c., whereby, &c. The pleadings on these two counts are precisely similar to those on the first.

4th count.—Asportavit 25 bushels of potatoes and an iron chain, &c.

Pleas.—1st, general issue. 2nd, *Actio-non*, that defendant was possessed of a freehold, and because said goods were incumbering the same he removed them as he lawfully might.

Replication, because goods were in a house of plaintiff's, and new assigns a house on part of 150 acres of No. 6, 3rd concession Loughborough.—To this defendant pleads *liberum tenementum* as to the house newly assigned, and justifies removal of goods as incumbering the same. The replication to this

plea and the subsequent pleadings are similar to those to the first count. At the trial it was proved that before plaintiff entered into possession of the *locus in quo* an agreement of the following purport was entered into: "I (defendant) bind myself firmly under a penalty of £200 to plaintiff to furnish him with a good and sufficient deed for 150 acres of land, being part of No. 6, 3rd concession, Loughborough, in consideration whereof, at the time there is a title given me (plaintiff) I bind myself to pay to the said defendant one hundred dollars, and one hundred dollars yearly for five years, namely, one hundred dollars at the expiration of each year, till payments are made." That plaintiff entered in November after the agreement; that defendant was in possession as owner when the agreement was made. How plaintiff got possession in the first instance did not clearly appear, but from all that took place it might fairly be presumed the defendant approved of it. It appeared that after the plaintiff was in possession defendant exhibited his title deed, and offered to convey the premises to plaintiff upon receiving the £25, but defendant did not actually tender a conveyance. The plaintiff was unable to pay the money, but offered £12, 10s., and craved an extension of the time for the residue. Defendant steadily refused any alteration of the terms of the agreement, and as plaintiff was not prepared to pay he declared the contract at an end, in positive and emphatic terms, to which plaintiff assented, fully admitting his right to do so in consequence of plaintiff's failure. Defendant agreeably to plaintiff's desire then verbally agreed to accept £12, 10s. to suffer plaintiff to enjoy the premises for a year, when he was to pay £37,

10s., in which event defendant was to convey, &c. At the end of a year defendant again offered to convey, (but offered no deed,) and the plaintiff was still unable to pay. There was evidence to go to the jury to shew that plaintiff had actually left the premises according to the terms of the verbal contract, being unable to pay the £37, 10s. before defendant's entry, and sufficient to warrant a verdict for the defendant on that ground. The jury were charged to decide. 1st.—Whether any act of trespass was proved involving the consideration how far the plaintiff was actually in possession at the time of defendant's entry. 2nd.—Whether the agreement was proved to be cancelled or not. The jury found for defendant, but did not explain upon which ground.

In Michaelmas Term, *Bethune* moved for a new trial, for a mistake of the judge at *nisi prius*, in having admitted verbal proof of the rescinding or abandonment of the original agreement.

Cassiday shewed cause; and the case stood for judgment till this term.

CHIEF JUSTICE.—Without examining the question whether in general an agreement in writing respecting an interest in lands can be discharged by parol, I am of opinion there is no ground for setting aside this verdict. That it is quite in accordance with the justice of the case seems plain from the evidence. The plaintiff brings trespass not from any injury offered to his person, or for any entry on the lands in question, while he was in actual possession of it.

To sustain this action he shews that he had once

entered into a written agreement with the defendant for the purchase of this land. By the terms of that agreement no time is set for the completion of the sale, but defendant is to make a title on plaintiff paying the purchase money. By the rules of legal construction the acts were to be contemporaneous, and though no time is set, it cannot be contended that the defendant was to wait an unlimited time till it might suit the convenience of the plaintiff to pay for the land, of which it appears he was let into possession. After a time defendant offered to make him a conveyance, but the plaintiff honestly owned he had not the money to pay for it, and the agreement was consequently not carried into effect. The written agreement contains no stipulation that plaintiff may retain possession under such circumstances. What, then, ought to be done? Clearly he should have relinquished the land he could not pay for, and if he had then immediately quitted the premises, and the defendant had re-entered upon his own land, could it be maintained that such an entry was a trespass? Surely it could have been no trespass upon a possession, or a right of possession. But then it is explained why he did not at that moment quit the possession. The defendant was confiding enough to enter at plaintiff's own request into a second agreement, under which a longer time was given to plaintiff to pay for the land if he could; he failed in everything, and finally left the place, and, as the jury have found (for that was expressly submitted to them), abandoned his possession of it, and the defendant entered upon his own land which the plaintiff had thus relinquished.

It is plain, under all these circumstances, that he

ought in common honesty to have given up the land, and all claim to the title or possession—he did leave it, and the jury have found that he did so intending to abandon it, and this, after hearing evidence about his leaving some potatoes and things in or about the house, which was a circumstance for them to weigh, as they have done. The question of a parole agreement rescinding a written one does not present itself here. If it did there is an apparent contradiction in some of the authorities on that head that would render a strict examination of them necessary.

SHERWOOD, J., concurred.

MACAULAY, J.—I shall forbear at present to examine how far the issue of fact raised by a second replication to one of the defendant's pleas could regularly be tried, while there is upon the record depending on a demurrer another replication containing the only unexceptionable answer to the plea, if not itself vitiated by the other, or whether it is competent to the parties by the course of pleading adopted to create various issues of law and fact, each embracing the same subject matter, and to raise out of the same facts similar questions upon points reserved at *nisi prius*, and likewise on the demurrer.

Confining myself to the evidence given at the trial, I should think it ought to be considered, in the first place, under the general issue, and if requisite, in connexion with the special pleas. The first and second counts being identical, they, with the pleadings applicable to them respectively, may be treated

together, though it is not without question whether the plaintiff ought not to have been restricted at the trial to one of them—3 T. R. 296 ; 7 T. R. 727. The special matter elicited was in my opinion admissible under the general issue, upon which plea (assuming that a *prima facie* case, owing to a possession by the plaintiff with the defendant's sanction, at the time when, &c., had been established) it was competent to the defendant to shew the original contract waived, discharged, determined, and at an end, and so to justify peaceable entry into his own freehold.—7 T. R. 354 ; 8 T. R. 403 ; 11 East. 72 ; Willes 222 ; 1 Bing. 158.

There was much evidence offered to shew that the plaintiff had actually abandoned his possession previous to the defendant's entry, and clearly no forcible or violent possession was effected ; but since it was left to the jury to determine, in the first place, whether the plaintiff was or was not in possession, with the direction in the latter event to find for the defendant, but in the former case to enquire further whether the original agreement continued to exist at the period of the alleged trespass, or had been previously revoked, and if rescinded still to return a verdict for the defendant, and as they did not explain upon which ground they proceeded, it is due to the plaintiff to decide upon the legality of the adverse result in either event.

Should the jury have thought that the plaintiff's possession continued at the period of the defendant's entry—in other words, supposing the verdict turned upon the first contract—I think the defendant's offer

to execute his part as proved, followed by the plaintiff's declaration of inability to perform his, and a dispensation with any more formal tender from the defendant, as also in evidence, exonerated the latter from the necessity of observing additional formalities, or of superadding acts that would be obviously nugatory, and left it in his power either to adhere to and enforce the agreement by action, or to rescind it in consequence of the plaintiff's default. 1 Salk. 112, 171; 2 Sal. 623; Doug. 694; 1 T. R. 638; 4 T. R. 761; 6 East. 555; 1 Moor 498; 1 Saund. 320.

The defendant having elected to rescind the bargain, and it being proved that the plaintiff also failed to observe the subsequent invalid verbal agreement, in consequence of which the defendant was by its terms entitled to re-enter, I am of opinion that the steps taken by the latter, whereby without violence he regained quiet possession of his own premises, were justifiable; that the circumstances formed a good defence under the general issue, and that the facts essential to support the line of defence adopted were satisfactorily substantiated.

The special pleadings now under consideration not going to the whole cause of action upon the record, it would be necessary to dispose of the demurrer, unless the defendant prevails under the general issue, which I think he ought to do. Were it in my view of the case important to regard the evidence as restricted to the special issues of fact, I should still be in support of the present verdict. Although it was contended at *nisi prius* that verbal proof could not be given of the abandonment before breach of an

executory contract required by the Statute of Frauds to be in writing, yet such is not precisely the question growing out of the testimony received. The issue was whether or not the agreement mentioned in the second replication to the first special plea to the first count, and in the replication to the first plea to the second count, had been discharged, waived, and at an end, as alleged by defendant, and the proposition would more correctly seem to be whether it could be shewn, *viva voce*, that when defendant offered performance of his part of a written contract respecting the sale of lands containing concurrent or dependent conditions to be mutually observed, he had been relieved by the plaintiff from a full and perfect execution, in consequence of his (plaintiff's) not possessing adequate means to fulfil his part, upon which it was mutually declared and agreed that the bargain should be rescinded, and whether by these circumstances it was in law revoked and determined accordingly. However, viewing the evidence under any aspect of which it is legally susceptible, I am of opinion that the parol proof was admissible. Notwithstanding much doubt has existed whether an agreement in writing, conformably with the Statute of Frauds, could be abandoned or cancelled by verbal consent or arrangement, I think the weight of authority preponderates against the absolute necessity of a written document to rescind or annul an agreement of the foregoing description. Authorities may be cited on either side of the argument, and some elementary writers speak diffidently on the subject, but the cases in favour of verbal proof outweigh those favouring a more formal course, and amongst other eminent writers, Mr. Roberts, in his treatise

on the statute, page 189, says—"It has long been considered as settled that agreements, though they cannot be altered or contradicted, may nevertheless be discharged by parol;" 1 Ver. 240; 2 Vez. 379; 9 Vez. junr. 250; and the present Solicitor-General of England * in his work upon the law of vendors and purchasers, page 110, after noticing all the cases, adds "that it is universally considered that an agreement in writing concerning land may be discharged although it cannot be varied by parol." Comyn. on Contracts, 304, 319, and 328, is to the same point.

A distinction with respect to the admissibility of verbal as distinguished from written evidence will be found to exist in equity, at least between cases in which a party seeks to enforce a contract and those in which the call for performance is resisted. In the latter instance verbal testimony is received when it would not be allowed in the former, and it seems to me that in an action like the present, when the whole turns upon the contested possession or right of possession, and in which the agreement of sale is not the foundation of the suit, but incidentally involved in the point of controversy, it might be just and salutary to adopt the rule obtaining in equity in favour of the defensive side in preference to that of a more strict and rigid character prevailing when an agreement is sought to be established and constitutes the gist of the action.

But I do not deem it necessary to resort to any ameliorated construction of the principles of legal evidence, for I deem the verbal testimony received

* Sir E. Sugden.

at the trial admissible, and applicable to the issue it was designed to sustain, upon authorities free from innovation. (a)

6 Bro. P. C. 587; Eq. Ca. Abr. 32; 2 Ves. 299, 376; 1 Ves. Jr. 404; 6 East. 86; Cro. Eliz. 483;
 6 “ 328; 9 Mod. 32; 6 B. & C. 534;
 7 “ 211; 6 Taunt. 259.
 9 “ 250.

LEONARD V. MERRITT.

Debt on bond for gaol limits, a blank had been left at the time of the execution in the condition, which was afterwards and with the obligor's assent, though not in his presence, filled up with the endorsement on the *ca. sa.* Held not a sufficient reason for nonsuiting the plaintiff on the plea of *non est factum*.

The plaintiff declared upon a bond dated 26th February 1830 in the penal sum of £100, conditioned after reciting, “that whereas one Joseph Markwell is in the custody of the sheriff of the district of Niagara, at the suit of S. W. upon a writ of *ca. sa.* endorsed for (£28, 11s. 10d. besides the interest on £12, 18s. from 18th January 1830, and the sheriff's own fees), and the said Markwell is desirous of having the benefit and advantage of the limits of the gaol of Niagara appointed and determined by an act or acts of the provincial legislature: the condition is, that if Markwell should be and remain within such limits without subjecting the sheriff to an action

(a) See *Cayley v. McDonell*, 8 U. C. Q. B. 455; *Brymer v. Thames, &c., Railway Co.*, 2 Exch. 549, and in error 5 Exch. 696; *Goss v. Lord Nugent*, 5 B. & Ad. 58; in *Sugd. V. & P.*, 13th edn., 139, it is said: “The result is that an abandonment of the whole agreement clearly made out—for the court will look at the evidence with great jealousy—is a good *defence* in equity, but that it is doubtful whether such a defence is available at law; perhaps the better opinion is that it is inadmissible at law.” The case, however, appears well decided, for the written agreement did not give the plaintiff a right to possession, and the defendant's title to the freehold was not denied.

or suit for an escape from the gaol limits by said S. W., then the obligation to be void, &c. Breach that Markwell left the limits, whereby, &c. Plea without *oyer non est factum*. There were other pleas, but not material to the question raised. It appeared in evidence at the trial that the words in the condition of the bond within the parenthesis were inserted after the execution thereof by defendant, but in pursuance of his assent, given previous to such execution, and a motion for a nonsuit was made on the ground that such insertion although so assented to vitiated the instrument. It was in evidence that the plaintiff had assented to the blank being filled up with the debt, but the interest or sheriff's fees were not specifically mentioned, nor was defendant present when the insertions took place, though one of the co-obligors was. A verdict was given for the plaintiff subject to this point, and in Michaelmas Term last *Draper* moved to set aside the verdict and enter a nonsuit.

The *Solicitor-General* shewed cause.

CHIEF JUSTICE.—The authorities upon the effect of erasures on deeds are collected in 9 Ea. 351; and in 4 T. R. 320. In 3 Esp. N. P. C. 246, a bill of exchange was altered by adding the words “or order,” with the consent of parties, and held not to be void. In Cro. Eliz. 627, it is stated that an addition made after sealing and delivery, but by a previous assent, does not vitiate the instrument, and such was the case here. As to the alteration going beyond the assent of the parties, I think it is not said on good ground. The obligor doubtless knew

the object of the bond, and when he consented to the filling up the blank with the debt, he must in reason be taken to have assented to the insertion of the indorsement as it stood on the *ca. sa.*, and not to have intended that a false description should be given of the writ. The debt necessarily drew the costs and sheriff's fees with it. The filling it up is not immaterial certainly, because it is the only matter that renders certain the suit in which the security was meant to be given, but I agree with the judge and jury, for it was left to them, that the assent of the obligor was given to the insertion of those words. If, indeed, there had been any ground laid for surmising that the assent had been perverted and abused by applying it to a different suit, the jury would no doubt have come to a different conclusion. I think the verdict should stand.

SHERWOOD, J., concurred that the verdict was right.

MACAULAY, J.—My researches have not satisfied me that a material alteration in a bond or other deed, made after execution, though in pursuance of a previous or subsequent assent, would not vitiate the instrument upon a plea of *non est factum*; and if this case depended upon that point I should not at present be prepared to sustain the verdict. But in my opinion, the matter added to the recital of the condition is not material, and that if struck out the bond would still subsist as effectual to the purposes contemplated by the parties as if the passage rejected had been inserted previous to the sealing and delivery. Being immaterial, the same, as forming no

part of the original instrument, may be expunged, without prejudice to the plaintiff's right of action, unless rendered material to be proved though not to have been introduced, from the manner in which it is incorporated with other statements essential to uphold the declaration. All are familiar with the distinction prevailing between allegations descriptive of written instruments or specialties set out on *oyer* (not done here), and *non est factum* pleaded—and those purporting to set forth merely the substance of the deed or writing; and I am of opinion that in the present suit the objectionable portion of the declaration (namely, the alleged indorsement of the *ca. sa.*) is not pleaded as descriptive of the bond and condition, but as substantially included in the recital to the latter.—2 Bl. Rep. 1104; 1 Mar. 214, 311; 2 Doug. 667; 9 Ea. 157; 3 B. & C. 2; 5 Ea. 440; 3 B. & P. 456; 1 B. & P. 281; 5 Esp. 133. It is not clear from the cases whether the unexceptionable part of the condition substantially establishes the declaration in the matter of the endorsement, but in my present opinion it does not.—3 Mar. 214; 1 Bing. 6; 2 Camp. 525; 2 Stark. N. P. C. 76.

This leads me to another well known difference between an immaterial allegation that might have been omitted, but being stated imposes the burden of proof, as laid by reason of its connexion with something essential to be retained, and from which (as forming together one substantial averment) it cannot be separated by the court, and an irrelevant allegation, which being not only immaterial and unnecessary, but not connected or incorporated with any thing that is substantial and important, might there-

fore be struck off on motion, or be rejected as surplusage.—1 R. & M. 291.

I do not however entertain the opinion that the endorsement of the *ca. sa.*, as suggested in the declaration, can strictly speaking be irrelevant though immaterial; but in this peculiar case, since the redundant and objectionable part of the supposed recital was proved to have been added to the bond with the approbation of the defendant, who could not consequently have been deceived or misled by its insertion, and as the same might have been omitted without affecting the plaintiff's right of action, or might have been struck out of the record upon motion of the defendant, or at the instance of the plaintiff, upon an application to amend before trial, I am of opinion that under such circumstances it is in the power and discretion of the court, in furthering the ends of justice, to relieve against its prejudicial operation.—2 Camp. 306. I deem it competent to them to reject that portion of the declaration which recites the amount of the endorsement, whenever the defendant, in virtue of a plea denying the obligation, grounds his objection upon a variance produced by the plaintiff inadvertently, perhaps, representing a passage to be contained in the original condition which turns out to have been supplied after the execution, with the assent of the obligor accompanying the delivery. Did the sufficiency of the plaintiff's case depend upon his retaining the clause the court could not aid him, and a non-suit must have followed his failure to establish that in law material matter introduced into a deed after execution, with the maker's assent, is to be regarded as a portion of the instrument, on a plea

of *non est factum*, the rejected portion not being indispensable to the validity of the bond, it follows, in my view of the subject, that it may be suppressed, in which event the bond may be sustained under the plea, and the plaintiff be entitled to retain his verdict under the evidence.

Per Curiam.—Rule *nisi* discharged.

DICKSON ET AL., EXORS. OF HAMILTON, v. MARKLE.

Where the plaintiffs declared as executors laying promises to the testator in his lifetime, promises to the plaintiffs as executors after his death, and an account stated with plaintiffs as executors, and proved an acknowledgment of the debt to plaintiffs. The court *held* that it was not necessary to produce the probate for the purpose of establishing their representative character.

INDEBITATUS ASSUMPSIT—promises being laid in the lifetime of testator, and a count inserted upon an account stated with the plaintiff's executors after testator's death.

Pleas.—The general issue and Statute of Limitations. At the trial at the Gore assizes, before the *Chief Justice*, a cognovit given by defendant to the plaintiffs and another person, as executors of Hamilton, was given in evidence in support of the account stated. No objection was raised that a cognovit was not proper evidence of an account stated, nor that the cognovit produced was given to three persons as executors, and not to the two present plaintiffs only. But a nonsuit was moved because the plaintiffs did not produce the probate, and it was urged that the cognovit did not, by admitting an account with plaintiffs in that character, dispense with the necessity of formal proof of their representative character. It

was also proved that recently before the action the defendant admitted the debt to the clerk of plaintiffs' attorney. The point was reserved, and the jury found for the plaintiffs.

A rule *nisi* to set aside this verdict and enter a non-suit was obtained last term by *Sullivan*.

The *Solicitor-General* shewed cause.

The case stood for judgment, which was this day given.

CHIEF JUSTICE.—I think there is nothing in the objection taken at the trial, and especially under the evidence given. The plaintiffs have declared in one count upon an account stated with them as executors, and a promise to pay them as executors. The general issue is pleaded. At the trial it was proved that the defendant has in writing acknowledged to be debtor to the plaintiffs as executors of Hamilton (*i.e.*) in the very capacity in which they sue, and has also admitted the debt verbally to the clerk of plaintiffs' attorney.

If it would otherwise have been incumbent on the plaintiffs to have proved their representative character, this admission would, I think, dispense with it on the authority reported in 10 Ea. 104, and many other cases. Those which relate to actions of slander, when the plaintiff sues in a particular capacity, proceed upon the same principle.

But I find nothing to shew that without such an admission the executors need have produced the pro-

bate. No case has been cited to that effect. In an action of trover for a conversion after the death of the testator the principle which requires such proof is very distinct; the plaintiff asserts a property, and the plea of "not guilty" goes to the foundation of the title; nothing is admitted by it, and the plaintiff must prove his special character in order to prove his property. The case 3 Ea. 409, and other cases in which the question has been raised, whether after the Statute of Limitations pleaded, and a promise within six years replied, the action could be sustained on proof of a promise to the executor—the declaration charging only a promise to the testator, give every room to conclude that at the trial no proof of the being executor was tendered or thought necessary. It is true Mr Chitty, in his notes to his treatise on pleading, appears to consider the proof necessary, but I do not find his conclusion supported by the authorities he refers to, or by anything expressed elsewhere, but at all events I think the admission in this cause included the character in which the plaintiffs sue as well as the existence of the debt.

SHERWOOD, J., concurred.

MACAULAY, J.—The question is not without nicety, but upon the best consideration in my power I think that when the party, plaintiff, declares as executor, and in separate counts alleges debts and promises to the testator in his lifetime, debts to the testator and promises to the executor after his death, and an account stated with the plaintiff as executor, with a profert of the letters testamentary, to the whole of which the defendant pleads a single plea of *non as-*

sumpsit, the representative character must be taken to be *prima facie* at least admitted, and consequently that the present verdict should not be disturbed. It is unnecessary to enquire whether a different result might have attended distinct pleas, or whether the defendant could have contested the special character as alleged without pleading *ne unques executor*.

On some occasions a different rule may obtain, as in trover for a conversion in the time of the executor, or in an assumpsit for goods sold by him, or other right of action arising after the death and grant of administration. The cause of action *prima facie* accruing to the executor in his own right he might sue in his own name, though the claim be susceptible nevertheless of being prosecuted in his representative character, because the amount claimed would when received form assets. In such instances it might be necessary to prove the special right, unless conceded by the pleadings or involved by express or tacit admission, in the nature of the transaction. Were this a cause partaking of the foregoing description, I am of opinion that by accounting with persons as executors the special character is (until the contrary be shewn at least) recognised and acknowledged, and that the party so accounting cannot, in general, afterwards impugn their right to sue in such capacity.

Had it not been for the recognition of the debt in favour of the present plaintiffs, proved by the clerk of the plaintiffs' attorney, I should have much doubted whether the *cognovit* affording evidence of an account stated with three individuals could support

an action instituted by two only, without accounting for the omission of the third. Generally speaking, the non-joinder of plaintiffs suing in *auter droit* can only be taken advantage of by plea in abatement, but when they seek to enforce a contract not entered into by the party they represent, but with themselves as his representatives (an account stated with three or more persons as executors, for instance) I do not perceive any sound principle upon which they can be regarded in any more favourable light than other suitors with whom a joint contract may have been originally made. When one of several executors prosecutes a debt accruing to the testator, whom the plaintiff represents in conjunction with others, a different rule may well prevail and does subsist.

The subsequent acknowledgement however to the agent of the present plaintiffs would seem to obviate the objection, independent of the consideration that this exception was not made a point at the trial.

Per Curiam.—Rule *nisi* discharged.

PHILLIPS V. SMITH.

When judgment was given for defendant on a demurrer to plaintiff's replication after a trial, verdict for plaintiff and contingent damages assessed. The court refused to allow the plaintiff to amend his replication.

In this case the plaintiff had gone to trial at the last assizes for the Bathurst District upon an issue in fact, and had recovered a verdict. He also assessed contingent damages upon a demurrer. Judgment was given for the defendant upon the demurrer,

which was to the replication, and now plaintiff applied for leave to amend his replication.

The whole court were of opinion that no authority warranted the amendment after a trial of the facts, a verdict, and assessment of contingent damages; and *Macaulay*, J., said that judgment would be entered for the defendant on the demurrer without regarding the verdict for the plaintiff, which becomes nugatory; and he intimated that when a judgment on demurrer is founded upon the defective manner of pleading, and not the defective matter thereof, such a judgment is not a bar to a future action in which the matter is correctly pleaded.—2 Bl. Rep. 831; 1 Mod. 207; Burr. 273; 2 Lev. 210; Burr. 321, 754, 1232; 1 Saund. 81 n. (a)

Per Curiam.—Rule refused.

FORSYTH AND RICHARDSON v. HALL.

The Statute of Limitations does not run against a plaintiff absent from the province at the time the cause of action accrues till he comes here. No action lies against an heir in this province on the simple contract debt of his ancestor. Lands and tenements held in fee-simple by a debtor at the time of his decease may be legally taken in execution and sold under a writ of *fi. fa.* issued on a judgment recovered against the executor or administrator of such deceased debtor.

DEBT against the heir upon the simple contract of the ancestor. The plaintiff declares that George Benson Hall, deceased, whose son and heir-at-law defendant is, and from whom defendant before the commencement of this suit had divers houses, lands, &c., situate in the province of Upper Canada, by descent, in his lifetime, to wit, &c., was indebted to

(a) See *Maxwell v. Ransom*, 1 U. C. Q. B. 281; *McLelland v. Rogers*, 12 U. C. Q. B. 651; *Mallock v. Scott*, 9 Q. B. U. C. 428.

plaintiffs in the sum of £4500 to be paid upon request, for divers goods, wares, and merchandizes, whereby an action hath accrued, &c.

2nd count. *Quant mer.*—For goods, wares, and merchandizes.

3rd count.—For money laid out and expended.

4th count.—For money lent and advanced.

5th count.—Upon an account stated. Damages £20.

First plea.—That George Benson Hall in his lifetime did not owe. Second Plea.—*Actio non accrevit infra sex annos.* Third.—*Actio non*, because plaintiffs heretofore, to wit, &c., impleaded one A. Hall, executrix of the last will and testament of the said George Benson Hall, and recovered against the said executrix £5005, 6s. 2d. for the same identical causes of action in the declaration above mentioned, to be levied, &c., which judgment still remains in full force not in the least reversed, satisfied and made void, wherefore, &c. Fourth, *actio non* as to the sum of £2276, 5s. 6d., because plaintiffs, &c. (as in the last plea). Whereupon plaintiffs for obtaining satisfaction thereof sued out a *fi. fa.* against the goods and chattels of the said George Benson Hall, in the hands of his executrix, to be administered by virtue whereof the sheriff levied £103, 3s. 6d., and returned that there were no more goods and chattels whereof, &c., whereupon plaintiffs sued and prosecuted another *fi. fa.* against the lands and tenements of the said George Benson Hall for £4902, 2s. 8d.,

by virtue whereof the sheriff took in execution divers lands and tenements which were of the said George Benson Hall at the time of his death, and levied thereout £2173, 2s. *Et hoc par est ver.*

Fifth plea.—*Onerari non*, except in the messuage and land in this plea mentioned, because defendant had no lands except one messuage and 492 acres in the township of Malden, and 800 acres in the township of Colchester, of the value of £2300. *Et hoc par. est verificare*: wherefore he prays judgment, except to the said messuage and land.

Sixth plea.—*Actio non*, as to the sum of £2276, 5s. 6d. (as in the fourth plea to the end of the return of the *fi. fa.* against lands), and then pleads nothing by descent except the lands and tenements so seized and taken into execution, whereof the said sheriff so levied, &c. *Et hoc par. est ver*: wherefore he prays judgment, &c., as to the said sum of £2276, 5s. 6d.

Seventh plea.—*Onerari non*, except in the sum of £2300, because he has nothing by descent except one messuage and 492 acres in the township of Malden, and 800 acres in the township of Colchester, of the value of £2300, whereupon he prays judgment, &c., as to the said sum of £2300.

Replication.—Takes issues on the first plea. To the second plea.—*Precludi non*, because plaintiffs when the several causes of action accrued were resident in foreign parts without this province, to wit, at Montreal in the province of Lower Canada, and still remain and are resident there; and that the said

plaintiffs have not been within this province at any time since the accruing of the said causes of action. *Et hoc par. sunt ver.*

To the third plea.—A general demurrer and joinder.

To the fourth plea.—A general demurrer and joinder.

To the fifth plea.—Prays judgment of the assets confessed.

To the sixth plea.—A general demurrer and joinder.

To the seventh plea.—Prays judgment of the assets confessed.

Rejoinder to the replication to the second plea *actio non*, because when the said supposed causes of action accrued, the plaintiffs resided in Montreal, in the province of our Lord the King of Lower Canada adjoining this province, and not separated therefrom by any sea, and still continue to reside in the said city of Montreal, *absque hoc*, that plaintiffs were resident in foreign parts, as in the replication alleged. *Et hoc par. est ver.* To which the plaintiff demurred generally and joinder.

This cause was argued in Hilary Term last on the demurrer to the pleadings upon the Statute of Limitations, by *Draper* for the plaintiffs and *Baldwin* for the defendant, and afterwards in the same term on the question of the sale of the lands in the hands of

the executrix, by the *Attorney-General* for the plaintiffs, and *Baldwin* for the defendant.

SHERWOOD, J., delivered his opinion this day. (After stating the pleadings)—Under these pleadings it seems necessary to determine the three following points:—1st, Whether the Statute of Limitations in this province runs against plaintiffs residing in Lower Canada, who have never come into this province. 2nd, Whether an action on the simple contract of the ancestor lies against the heir. 3rd, Whether the lands which a testator or intestate held in fee-simple at the time of his death can legally be sold under a judgment recovered against the executor or administrator.

As to the first point. Before the passing of the statute 31 Geo. III., c. 31, that part of British North America now called Upper Canada formed a portion of the late province of Quebec, and so far as concerned matters of controversy relative to property and civil rights was governed by laws principally of French origin, called the laws of Canada. The act last mentioned divided the province of Quebec into Upper and Lower Canada, and gave each of those colonies a legislature with full power to make laws for the peace, welfare and good government of the inhabitants residing within its limits. The first exertion of legislative power in this province wholly abolished the code of French laws and introduced those of England in their stead, not by enacting such parts of them separately as appeared best adapted to the local circumstances and political state of the province from time to time as occasion required, but

by adopting them in a mass, subject to a few exceptions only. The consequence of this sweeping measure was to range in our statute books many English acts whose phraseology strongly marks their insular extraction, and if construed according to the strict letter would produce effects never contemplated by the adopters. Upon examination it might be found that no British act which had been made the law of this province in the very words in which it was found in the English statute book is more liable to this kind of objection than the one I am about to consider.

The statute 21 Jac. 1, c. 16, was passed in England, as the words of the preamble declare, "for quieting men's estates and avoiding of suits," and is a very important and beneficial law, which the public good imperatively demanded both in Britain as the act of the British Parliament and in this province as the law of the provincial legislature. In the case in Bl. Rep. 286, *Wilmot, J.*, said, "the Statute of Limitations ought to be construed liberally; I think it is a noble beneficial act. *Interest reipublicæ ut sit finis litium.*" A part of our Statute of Limitations must receive an equitable construction or it can receive no rational construction at all—it would as to some important points without such assistance become a nullity. An equitable construction of a statute is thus defined by Lord *Coke*: "The equity of a statute is a construction made by the judges that cases out of the letter of a statute, yet being within the same mischief or cause of the making of the same, shall be within the same remedy the statute provideth." Co. Lit. 246. This rule is in truth no other than

that which ought always to be applied in every case of a fair and correct exposition of any instrument of a public nature, which is to pursue its meaning according to its true intention and entire text, and to give effect to every part of it as far as possible. This end could never be accomplished by a strict construction adhering to the very letter of the Statute of Limitations; I shall therefore not attempt it, but will endeavour to be guided by its true meaning, which I consider the proper course.

By the Statute of Limitations the legislature say "that all actions on the case shall be commenced within six years next after the cause of such action or suit, and not after," and in the seventh section declare that any person entitled to such action who is "beyond the seas at the time of any such cause of action given or accrued," fallen or come, may bring an action within six years after he has returned from "beyond the seas," as any other person having no such impediment might do.

The first question which naturally presents itself upon reading the seventh section is, what did the legislature of Upper Canada mean by the expression "beyond the seas." The slightest acquaintance with the geography of the country must convince anyone that the legislature which adopted the law well knew that there was no sea in Upper Canada, nor within many hundred miles of its borders, but as they introduced the statute here as part of the law of England, they must have supposed it would have been construed according to the principles of the English decisions on the same statute, and I think it

will be found that even in England the act does not always receive a literal construction. The cases which have been decided there on the statute 21 Jac. I., ch. 16, go to prove that the words "beyond the seas" have two different meanings. 1st, They mean out of the Kingdom of Great Britain. 2nd, Out of the bounds of the British seas. An explanation of the phrase is given in Co. Lit. 107, 260, A. & B., both in the text and in several notes subjoined. "Beyond the seas," according to those authorities, is the same as to say "*extra regnum*," and is likewise the same as to say "*extra quatuor maria*," but every lawyer knows that the latter expression is vastly more extensive than the former. A place "*extra regnum*," or out of the Kingdom of Great Britain, is *ex vi termini*, either out of the allegiance of the King, or beyond the four seas which surround Great Britain. It may be out of the realm or kingdom and still be within the four seas and within the allegiance of the King. The most extended sense of the phrase "beyond the seas" undoubtedly means beyond the four seas which surround Great Britain, and are often called the British seas. According to Mr *Selden*, in his *mare clausum*, lib. 2, pp. 24, 31, the British seas to the west extend quite over the Atlantic Ocean, which washes the western coast of Ireland, and consequently Ireland in fact is within the four seas. Ireland, however, before the union, was "*extra regnum*," or out of the Kingdom of Great Britain, and on that account has by legal construction been determined to be "beyond the seas." Lord *Holt* held that any place in Ireland was "beyond the seas," within the meaning of the statute of Limitations, as appears in Show. 91. Lord *Holt*

did not advance it as a fact that Ireland was situate beyond the four seas or out of the allegiance of the King, but he merely said it was "beyond the seas" within the meaning of the Statute of Limitations, or, in other words, such a construction of the act was necessary to carry the intention of the legislature into effect. By a literal construction of our Statute of Limitations it would clearly run against all persons on the two continents of North and South America, out of the limits of Upper Canada, for such persons are not in fact "beyond the seas," and still it is well known that most of them are foreigners and out of the allegiance of the King; such a construction would therefore be in direct opposition to the decision in England. According to the case in Bl. Rep. 723, and 3 Wils. 145, the court say, "If the plaintiff is a foreigner and doth not come to England in fifty years, he still hath six years to bring his action after coming to England." Upon the whole I am of opinion that the phrase "beyond the seas," which happens to be found in our provincial law, can mean nothing more than the phrase "out of the province of Upper Canada," and that a person who is out of the province when the cause of any action like the present accrues may commence an action within six years after he comes into the province, and if he never comes into the province the statute does not run against him at all.

As to the second point, no case is found in the books which throws any light on the subject. One instance, however, is said to have occurred in this province in which a majority of the judges of this court entertained an opinion consonant with the

doctrine advanced by the counsel for the plaintiffs. Unfortunately for us the lapse of time has borne away all recollection of the remarks made by the judges on that occasion, and there was no reporter then to note the arguments which must necessarily have followed a difference of opinion among the learned brethren. The result is stated, but nothing more, and yet there is one important fact admitted on all hands, which is, that the judges were not unanimous on that occasion. I probably entertain the same general views of the question which the learned judge did who then stood alone; and after considering the case in all its bearings I am convinced I shall not alter my opinion unless the King in council determines it to be erroneous, and then it would be my duty to conform to the judgment of a superior court.

That such an action as the present does not lie at common law need not, I think, be laboured at this time, because I take it for granted that such a proposition would receive the immediate assent of all professional men. If the action, therefore, does lie at all, it can only be sustained by virtue of the statute 5 Geo. II., c. 7, and before I proceed to make any remarks on that statute I will briefly premise that real estate situate in the plantations seem to have been considered, before the passing of that act, in the nature of personal property, and to be assets in the hands of the executor or administrator for the satisfaction of debts.—2 Ventr. 358; 4 Mod. 226; 3 Ves. Jr. 118. The knowledge of this fact may be of some assistance in forming a correct opinion of the real intention of the British legislature

in passing that law, as it is not at all probable they were desirous of making any important change in the long established opinion that real estates were assets like goods and chattels for the payment of debts in the colonies. It is quite clear from the preamble of the statute 5 Geo. II. that the legislature were sincerely anxious to facilitate the collection of debts in the plantations by giving a more ready and easy remedy to the creditor than was in use before that time, and by establishing one uniform mode of proceeding. Britain at that period possessed many extensive and populous colonies on the continent of North America, as well as in the West Indies, and almost every one of them had a separate legislature, and consequently possessed its own municipal institutions, at least to a certain extent. In some it is most likely lands were assets for the satisfaction of debts; in others most probably they were not; and this diversity in the laws of the colonies must have been productive of vast inconvenience, uncertainty, and delay to the English creditor. When the wealth and power of a nation depend on commerce it will uniformly be vigilant to discover and prompt to remove all obstacles to its free course. The legislature clearly express their motives in the preamble of the act. The words are the following: "Whereas His Majesty's subjects trading to the British Plantations in America lie under great difficulties for want of more easy methods of proving, recovering, and levying of debts due to them than are now used in some of the plantations, and whereas it will tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the

said plantations and to the advancing of the trade of this kingdom thither if such inconveniences were remedied." The legislature then proceed to make some important and beneficial alterations relative to the mode of proving debts sought to be recovered by an action instituted in the colonies, in which a person residing in Great Britain is a party; then they pass on to the present subject. and by the fourth section of the statute enact "That from and after the said 29th September 1732 the houses, lands, negroes, and other hereditaments and real estates situate, lying, or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever owing by any such persons to His Majesty or any of his subjects, and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other speciality, and shall be subject to the like remedies, proceedings, and process in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments, and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations are seized, extended, sold, or disposed of for the satisfaction of debts." The legislature expressly declare that creditors were placed under great difficulties by the method in use in some of the plantations for the recovery of debts, and express their determination to remove the inconveniences complained of, and it appears quite evident from

the whole tenor of the act, that they were quite anxious to establish some uniform system through the colonies, founded on better principles and calculated to place the colonial trade on a more advantageous basis. With this view the parliament then proceeded to make real estates in all the colonies liable to the payment of all just debts, whether due by speciality or simple contract, precisely to the same extent during the life of the debtor as personal estates are liable for the same purpose, and they distinctly give the like remedy, process, and proceedings, and in like manner for seizing and selling the one species of property as the other while the debtor lives. Real and personal estates are therefore placed on the same footing for the payment of debts during that period—the statute clearly makes them so, and gives one and the same remedy against both. The position to this extent seems indisputable: no doubt is now entertained on this subject, for a superior court has settled the question. After placing real and personal estates in the same condition for the payment of debts while the debtor lives, what possible inducement could the legislature have to make any difference after his death? Would such a step give a more easy method of recovering debts as expressed in the preamble of the act? What method was in use before the 5 Geo. II. I have not been able to learn, but it appears to me that no method of collecting debts could be more inconvenient and more liable to objection than the one which compels the creditor to resort to the heir for satisfaction. The heir might be an infant of the most tender age; he might be in a foreign country, or he might be unknown for many years to the creditor; and in every

one of these cases the necessity of a resort to the heir would almost amount to a discharge of the debt. If the heir, however, might conveniently be sued, still he might not have sufficient assets to satisfy the debts, and then the personal property must be realized through the medium of the personal representative, and consequently two actions must be brought instead of one, which would be sufficient, supposing the real estate liable in the same manner as the personal, because both could be sold under the same judgment. The necessity of a double proceeding under any circumstances, for the purpose of selling the real and personal property, would, in my opinion, destroy the pledge given by the legislature in the preamble of their act, and therefore goes a great length to prove the construction incorrect which forms its foundation. The plaintiffs allege that the part of the fourth section of the statute which declares that real estates shall be assets for the satisfaction of debts, means only as they are liable for debts in England due by specialty, and that the heir must be sued in England before the real estate of the ancestor can be taken in execution. The plaintiffs further insist that the allusion I have just stated necessarily implies this consequence, that the heir must be sued in the colonies by virtue of 5 Geo. II. before the real estate of the ancestor can be sold for the satisfaction of his debts. Now, it appears to me the fallacy of the argument consists in this, that the right of the creditor to satisfaction from the real estate is confounded with the remedy to recover such right. I think this part of the fourth section clearly gives the creditor in the colonies an absolute right to satisfaction of all just debts, from the real estate of

the deceased debtor. In my view this part of the act fixes the liability of a deceased debtor's real estate to the satisfaction of all his just debts, but it was never intended to designate the remedy by which such debts might be recovered; that important provision is found in the subsequent part of the act. All that the legislature declare in this part of the statute is "that real estates in the colonies shall and may be assets for the satisfaction of all just debts, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty," which is substantially the same in my opinion as if they had said "that real estate in the colonies shall constitute a fund to their full value for the payment of all just debts after the decease of the debtor, in the same manner as real estates in England constitute a fund for the payment of specialty debts due by a deceased debtor in his lifetime."

When any description of property which belonged to a deceased debtor in his lifetime is made liable to the satisfaction of his debts, it is styled "assets" in law; and lands are assets in England when the owner dies indebted on specialty by which he has expressly bound his heirs, and therefore the contract made by the owner of lands is the sole cause of the lands becoming assets. This proposition is fully established by the following passage in 2 Bl. Com. 244; where Finch's Rep. 86, is cited as an authority. "If a man covenant for himself and his heirs to keep my house in repair, I can then (and then only) compel his heir to perform this covenant where he has an estate sufficient for this purpose, or assets by

descent from the covenanter ; for though the covenant descends to the heir, whether he inherit any estate or no, it lies dormant, and is not compulsory until he has assets by descent."

It appears, therefore, that lands are assets in England independently of any proceedings against the heir, and consequently are assets without such proceeding in this province, because the 5 Geo. II. expressly makes them assets for the satisfaction of all just debts, in like manner as they are assets in England for the satisfaction of speciality debts. In England the creditor has a right to the annual value of the deceased owner's lands in satisfaction of his debt in certain specified cases only ; but by virtue of the statute he has a legal right in this province to their entire value in payment of all debts which shall appear to be just and legal. When the creditor in England wishes to reduce this right into actual possession by recovering the amount of his debt from the real estate of the deceased debtor, the law then requires him to institute proceedings and to obtain judgment against the heir when the estate has descended to him ; but when the lands have been disposed of by will then the proceedings and judgment must be against the heir and devisee. The security therefore given to the creditor in England varies according to the existing circumstances of the case ; sometimes the devisee is joined with the heir, at other times the heir is sued alone ; and if the British Parliament had thought it expedient by 3 Wm. & M., ch. 14, to change the common law remedy altogether, and to direct all proceedings to be had against the personal representative of the

debtor instead of the heir and devisee, I think no one would have attempted to prove such a law unconstitutional. The power of the legislature to modify the right or remedy as frequently as occasion may require cannot properly be disputed, and the only doubt in any case must be whether they have done so or not. As the law of England does not authorise an action on simple contract of the ancestor to be brought against the heir, and as it appears to me the statute 5 Geo. II. makes no alteration in the common law in this particular, either by express words or necessary intendment, I am of opinion that no action lies against the heir in this province on the simple contract of the ancestor.

As to the third point. It is contended by the counsel for the plaintiffs that we have the law of England in this province, and that according to that law the real estate is assets in the hands of the heir for the satisfaction of speciality debts; and the reason is that he is the person most interested, and should never be deprived of his inheritance without an opportunity of defence. It is also urged that when debts on simple contract are to be satisfied from the real estate in this province, the proceeding in principle must be analogous to the other, and consequently the same necessity of proceeding against the heir here as in England, notwithstanding the difference of the nature of the contract. That true it is the statute 5 Geo. II. subjects lands in the colonies to the satisfaction of simple contract debts after the decease of the debtor, but yet the statute makes them assets in like manner as they are liable in England for speciality debts, and therefore the proceedings to

make them productive to the creditors must be the same as in England.

The answer to these objections is obvious. Lands in this province are not liable to simple contract debts by the law of England. Their liability to that end is created by a statute forming no part of that code. When by the law of England real estates are assets to satisfy creditors in this province, then the heir is the legal representative of the ancestor, and may be sued if the creditor elects that course. The 5 Geo. II. gives a right to the simple contract creditors wholly unknown to the law of England; and the same act gives a remedy to recover that right to which the English law is a stranger; and if we are desirous of obtaining correct information of the mode of proceeding in such cases we must resort to the statute. When the statute was passed, a debt on bond by which the heir was bound could have been collected in England in two ways—that is to say, either against the personal representative or the heir of the deceased obligor. The law of England therefore provides two separate funds and two distinct remedies to enforce the payment of such a debt. If one of the funds is insufficient, recourse is had to the other, and often to both, by simultaneous suits, the inconvenience, trouble, and expense of which were most probably one of the chief inducements of the legislature for establishing a new system in the colonies. They distinctly enact that both the real and personal estate of a debtor shall be liable to the payment of all his just debts, and that they may be proceeded against and sold in the most convenient manner then in use—that is to say, precisely in the

same manner as personal estates are proceeded against and sold for the satisfaction of debts. The mode of proceeding by seizing and selling the goods under a writ of *fi. fa.* is in my opinion the most easy, and at the same time the most efficacious mode of proceeding against the lands which could possibly be devised, and the only one which offers a fair prospect of recovering colonial debts. The property in lands is acquired with more facility, and therefore to a greater extent in the colonies than other kinds of property; and most of the inhabitants have a sufficiency to produce satisfaction of their debts, especially when the personal property is called in aid of the real.

The remedy created by this statute unites all the advantages of the two remedies given by the law of England without the delay and uncertainty which attend the one against the heir. By that mode of proceeding no writ of *fi. fa.* can issue against the lands; and those who entertain an opinion that the heir should be sued in this province are compelled to admit that without the aid of the statute the lands would not be sold at all—an admission, I think, conclusive against their opinion. The statute clearly gives no remedy, partaking in part of the nature of the proceedings against the personal representative, and in part of proceedings against the heir; but the line, as appears to me, is distinctly drawn by which the former is adopted and the latter is wholly rejected, for there is an express enactment giving the like remedies, proceedings, and process against the real estate as are by law given against the goods and chattels, and therefore a writ of *fi. fa.* by virtue

of the statute may issue to sell the lands because it may issue to sell the goods. If the creditor proceed to the seizing and selling of the real estate as he does the personal he finds abundant authority in the statute to support him; but if he pursue the course which the law of England directs against the heir he finds himself driven to the necessity of placing a forced construction on the statute which neither the words nor the general tenor of the act can possibly justify.

The system he forms is composed of heterogeneous principles, which appear irreconcilable, or at any-rate extremely difficult to reconcile. It may not be improper here to give a brief statement of the ordinary proceedings, according to the law of England, against the executor as well as against the heir in order the more clearly to show the difference between them, and the probability that the legislature intended to adopt the former and reject the latter altogether. When the creditor on bond brings an action in England against the personal representative the declaration must state that the defendant unjustly detains the debt, not that he is indebted to the plaintiff, and final judgment is entered for the debt and costs to be recovered against the goods and chattels of the deceased debtor. A writ of *fi. fa.* issues on the judgment on which the goods and chattels are sold for the satisfaction of the debt. When the bond expressly binds the heir the creditor may sue him if he has real assets, or, as they are usually styled, assets by descent. The declaration must state that he is indebted to the plaintiff and unjustly detains the debt; and final judgment is

usually entered against the heir to be levied of the lands and tenements descended to him. The writ of extent then issues, under which the yearly value of the lands is taken by the creditor, and the lands are held till he is satisfied the amount of his debt, after which the possession of the lands returns to the heir. This is the most beneficial mode of proceeding which the law of England gives the creditor against the heir, but the estate in fee simple in the lands is never sold, either on an extent or an elegit against the heir.

Now, it is quite evident that these two modes of proceeding are unlike each other, and distinguished by a marked difference at every step in each proceeding. The object of each is the obtaining satisfaction of the debt, but that end is reached when the heir is sued by means of a proceeding and process entirely dissimilar in substance and in form from those which must be adopted against the executor or administrator, and consequently neither the whole of both, nor a part of one and a part of the other, can be adopted consistently with the express words of the statute, which declare that lands shall be liable to the like proceedings and process for seizing, selling, and disposing of them, and in like manner as personal estates are seized, sold, and disposed of, for the satisfaction of debts. When two different roads lead to the same point you cannot legally make use of both under a license to proceed on one; and when a statute enjoins the doing of a certain act, the performance of another act, different in itself but producing somewhat similar effects, can never be properly deemed a compliance with the law, even if

what the act directed to be done should be found on trial to be in some degree more inconvenient than the other. Arguments *ab inconvenienti* are admissible only when the intention of the legislature is doubtful, but when the words of a statute are explicit and the meaning plain, it is in vain to insist that the act is inconvenient to particular individuals or class of individuals in society. If the 5 Geo. II. produces inconvenience to the heir, it is at the same time productive of incalculable benefits to the community at large, and its repeal would be followed by great public detriment, and therefore cannot legally be objected to on this ground. *Lex citius tolerare vult privatum damnum quam publicum malum.* Co. Lit. 152, b. In 4 M. & S. 261, Lord *Ellenborough* says, "The court is governed by the principle of law, and not by the hardship of any particular case. What can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage, and his person also shall be liable for it, and what is still more, he shall not recover contribution."

I am not convinced, however, that the statute 5 Geo. II. can properly be said to occasion any inconvenience to the heir greater than what the law tolerates as respects the other children of the deceased. The heir perfectly well knows that when lands descend to him they come to his possession accompanied by the same liability to the satisfaction of the just debts of his ancestor which is attached by law to all the personal estates. Now, suppose

the heir to be the only child, and entitled to all the real and personal estate, and suppose the ancestor has appointed a stranger his executor, who has the sole possession and management of the personal property, amounting to twenty times the value of the lands, what just cause of complaint can the heir have against a statute which sanctions the sale of lands to satisfy the debts by the same proceeding and process by which the goods and chattels of a much greater amount are disposed of, or at least liable for the same purpose? After the payment of debts the heir will become the owner of both lands and goods, and yet he is dissatisfied with the law in regard to the former, and satisfied with it as respects the latter. There can be no danger of fraudulent practice between the creditor and executor in the case of lands more than of goods, and if fraud did actually occur, the remedy would be as open and effectual in the one instance as the other. If the creditor prosecute the executor when there are no lands to enforce payment from the goods, the heir is never allowed to become a party to the proceedings, although he may be entitled to a large surplus of the personal estate. Is not this as hard a case as the other? And yet this is the law.

It may not be found irrelevant here to state that the 5 Geo. II. was the law of this country for many years before the law of England superseded the law of Canada, as I have before stated. The 14 Geo. III., ch. 83, sec. 18, expressly declares all acts of the British parliament made concerning or respecting the colonies or plantations in America, should be in force in the late province of Que-

bec, which then comprised the territory now called Upper Canada; and the 31 Geo. III., ch. 31, sec. 53, enacts that all laws and statutes which were in force in the late province of Quebec should be in force in this province till repealed or varied by the legislature. Since the substitution of the English for the Canadian law in this province, the highest court of appeal from the colonies has determined the 5 Geo. II. is in full force here, and the act must therefore be construed according to the common law rule in such a way as to give full effect if possible to the entire provision of the act, and the intention of the law makers. The great object of the statute is to facilitate the recovery of just debts, and this object must be kept steadily in view whenever a correct exposition of the law is expected. To attain this end I think the legislature intended the very same proceedings which led to a sale of the goods should simultaneously produce a sale of the lands. This, in my opinion, is the keystone of the fourth section of the statute, which unites and sustains the whole.

It is difficult for a professional man to divest himself of the idea that when real estates are assets for the satisfaction of debts, the heir must exclusively form the medium through which such estates can ever become available to the creditor; and yet this general principle is subject to some exceptions even by the law of England.

Circumstances have existed in England capable of effecting a necessary alteration in the nature and quality of certain freehold estates to as great

an extent as the measure is carried by the 5 Geo. II. I allude to the estate *pur auter vie*. That is a freehold estate, and in no respect partaking of the nature of goods and chattels. "It is given or confirmed by the same feudal rights and solemnization—the same investiture or livery of seisin—as estates in fee simple themselves are;" and so rigid was the common law rule, that until an occupant actually entered after the death of the tenant the freehold was said to be in abeyance. The definition of this term is cited in Co. Lit. 362 b, and I will cite it for the purpose of shewing how extremely averse the common law was to allow real estates ever to assume the nature or qualities of personal estates. The anxiety to keep the two descriptions of estates distinct, even against the dictates of justice, was carried so far almost as to border on the ludicrous. A kind of temporal and neutral estate was created and kept waiting for some transient occupant, rather than allow any circumstances to have the effect of assimilating the real to the personal estate. Lord Coke says—"If tenant *pur auter vie* dieth, the freehold is said to be in abeyance until the occupant entereth, that is in expectation, in remembrance, intendment or consideration of law. In *consideratione legis*, because it is not in any man living; and the right that is in abeyance is said to be *in nubibus*—in the clouds—and therein had a quality of fame whereof the poet speaketh,

"Ingrediturque solo et caput inter nubila condit."

The British parliament, however, seemed to have entertained a less exalted opinion of the doc-

trine of abeyance, and at once put an end to its existence in the case of estates *pur auter vie*, by an entire abolition of general occupancy. The statute 29 Car. II., c. 3, s. 12, and 14 Geo. II., c. 20, s. 9, make freehold estates *pur auter vie* like goods and chattels in some cases, and give them to the executor or administrator, although by the rule of common law a freehold estate could never vest in the personal representative. The first statute declares that estates *pur auter vie* shall be deviseable; but if not devised, and they descend to the heir as special occupant, they shall be real assets, precisely in the same manner as lands in fee simple. The second statute enacts that such freehold estates, when not devised, and when there is no special occupant, shall go, be applied, and distributed in the same manner as personal estates of the testator or intestate. These statutes most judiciously make real estates of a certain description, and under certain circumstances, to assume the nature and quality of personal estates; and can it with truth be asserted that the 5 Geo. II. does more? By that statute real estates in the colonies are made *quasi* personal estates, for the satisfaction of just debts; and at this point the innovation on the common law principle completely ends, and never after makes its appearance through all the multifarious changes incident to the transmission of real estates by descent, devise, conveyance, or marriage. The honest debts of the deceased owner being fully satisfied, the diverging line marked out by the statute for the sole purpose of affording distribution and speedy justice, immediately returns to the ancient parallel of the common law, and uniformly continues in the same

direction without further deviation. In my opinion the more anyone reflects on the intrinsic justice and moral obligation of making all kinds of property subject to the satisfaction of all just debts—the more he considers the great advantages of simplifying the proceeding for the recovery of debts in order to avoid a waste of the means—the more he will appreciate the provisions of the 5 Geo. II., and the wisdom and justice of the British Parliament in making that law.

Upon as full a consideration as I have been able to give the subject, I am of opinion that lands and tenements held in fee simple by a debtor at the time of his decease may be legally taken, sold, and disposed of under a writ of *fi. fa.* sued out on a judgment recovered against the executor or administrator of such deceased debtor.

Judgment must therefore be entered for the defendant in this case.

The CHIEF JUSTICE and MACAULAY, J., having been concerned in this cause when at the bar gave no judgment; but after SHERWOOD, J., had decided, the CHIEF JUSTICE said that he felt it right to state that he concurred with his learned brother in the conclusion he had come to as to the intention and effect of the statute 5 Geo. II., c. 7, in rendering lands liable to executions upon judgments against the executors or administrators. (a)

(a) See *Gardner v. Gardner*, 2 Old Series 520; *Seaton v. Taylor*, 3 U. C. Q. B. 303; *Doe dem. Lyon v. Lege*, 4 U. C. Q. B. 360; *Bowes v. Johnson*, 6 Old Series 158; *Ward v. McCormack*, 6 Old Series 215; *Sickles v. Asselstine*, 10 U. C. Q. B. 203; *Graham v. Nelson*, 6 U. C. C. P. 280; *Topping v. Yardington*, 6 C. P. U. C. 347; *Mem. v. Short*, C. P. U. C., decided 18th June 1859.

DOUGALL V. MACLEAN.

When notice of intention to move on the ground of irregularity is required in England to be given two days prior to the execution of the writ of enquiry, a similar notice shall be given in this court not later than the first day of assizes at which the damages are assessed.

In this case, which came before the court on a motion to set aside the interlocutory judgment and subsequent proceedings, it was determined that in all cases when by the English practice two days' notice of intention to move to set aside proceedings prior to the execution of a writ of enquiry was necessary, that the notice here might be given not later than the first day of the assizes for which any notice of assessment of damages was given, and they directed that such in future should be the practice.

THE KING V. THEALE.

On the traverse of office the issue was whether Lane, an alien, was seised on the 1st July 1812 of the lands in question, the traverser having proved a *prima facie* title. A possession was proved in the alien about 20 years before the trial. No conveyance was produced, but a memorial of a mortgage for years from Lane to the original grantee of the Crown under whose heir traverser claimed. *Held* not conclusive evidence of a seisin in fee of Lane; and the judge at N. P. having left it to the jury to find under the evidence whether the original grantee had conveyed in fee to Lane, and they finding for the traverser, *i.e.*, negatively, the court refused a new trial.

The defendant had leave by a private act passed in the last session of the provincial legislature (11 Geo. IV., c. 33) to traverse any inquisition or office found, whereby the real estate in lot number eighteen in the tenth concession of the township of Grantham has been vested in his Majesty as forfeited, as having been the property of one Thomas Lane, who withdrew himself from this province during the late war; and he pleaded that the land in question was granted to George Turney the elder, who died seised there-

of, whereupon the same descended to George Turney the younger, who conveyed to the plaintiff, traversing that Lane ever was seised in fee of the premises, and on this issue was joined. At the trial the grant to George Turney was proved, and that George Turney the younger was his heir-at-law, and the conveyance from him to the traverser dated 6th January 1825 was put in evidence. On the part of the Crown witnesses were called to prove that the lot in question had been known as "Lane's lot" for upwards of twenty years, that one McMarlane occupied it about twenty-two years ago, and made improvements on it, and represented himself at that time as tenant to Lane. That Turney the elder in 1810 or 1811 said Lane had paid him for the lot, but that was no proof that any deed had been given. The register of the county then produced a book which he stated he believed to be a book of his registry office—he received it from an attorney in Niagara—it was one of the books which was carried off by the enemy during the late war. This book was further proved to be in the handwriting of John Powell, Esquire, who was formerly register of the county. It contained an entry in Mr Powell's handwriting purporting to be a memorial of a mortgage from Lane to Turney the elder, to secure payment of a sum of money; it was for a term of years. And the *Attorney-General* contended this was conclusive evidence, and that Turney, and those who claimed under him, were estopped to deny a fee in Lane having received a mortgage from him.

SHERWOOD, J., left it to the jury to say whether under all the evidence they believed Turney had

conveyed the land to Lane or not ; and after retiring for a short time they found for the traverser.

In Michaelmas Term last the *Attorney-General* obtained a rule *nisi* for a new trial, and now *Draper* shewed cause.

The court, however, thought the evidence properly left to the jury, and that there was no reason to disturb their verdict, and the *Chief-Justice* intimated that if it had been necessary to examine into the question, a good deal might be found in the objection raised by *Draper*, that this was not a case in which the court would exercise its power of granting a new trial.

Per Curiam.—New trial refused.

Vid. Cowp. 37 ; Show. 336 ; 1 Lev. 9 ; 1 Sid. 153 ; Willes 533.

THE ATTORNEY-GENERAL V. SPAFFORD.

To an information for the condemnation of goods as illegally imported, the defendant pleaded that they were not imported *modo et forma*. On the trial of this issue the defendant was not allowed to prove that the goods were landed through stress of weather, and the jury found for the Crown. The court held the evidence should have been received, and granted a new trial.

INFORMATION for the condemnation of certain goods seized by the collector of the port of Brookville for having been landed without being duly reported. The defendant claimed the goods and pleaded that they were not imported *modo et forma*, on which issued was joined. At the trial at the last assizes for the Johnstown District, cor. *Macaulay*, J., the defendant offered to prove that he reported in writing

to the collector of Brockville that he intended importing certain goods on the day of the seizure, but no duties were paid. That he had directed his clerk to bring over from the United States those articles only, and to remove other merchandise from one place to another on the United States side, instead of which the clerk brought all over to Canada, arriving at 11 o'clock at night. That the weather being stormy prevented the clerk unloading on the other side the articles he was to have left there, and obliged him to bring them to this side. That the clerk landed the goods that night before the claimant knew of it, the wind being so heavy as to render it necessary. That as soon as the claimant was apprised of it he reproved his clerk for bringing them over, and told the clerk they had not been reported. That the clerk said they might be taken back, which claimant refused, and directed them to be left till morning, when he would see the collector on the subject. That the goods were seized in the morning before he had time to report them.

MACAULAY, J., thought that the above facts, if proved, would not sustain the issue to be tried; that the goods being imported and landed before entry, the facts alleged in the information as constituting a legal cause of seizure and forfeiture were admitted. A verdict was rendered for the Crown, and leave given to the claimant to move for a new trial on the ground of the rejection of the evidence offered.

Last term *Draper* moved for a rule *nisi* to set aside this verdict and grant a new trial on the point reserved.

And this day the *Attorney-General* shewed cause.

The court thought the fact of an absolute necessity (through stress of weather) for landing the goods contrary to the will of the party would constitute a good defence; and that as the question involved a contemplated breach of the law no special plea was necessary in this case. It would be unreasonable to say a party must look on and see his goods destroyed for want of a report which he had no opportunity of making. The following cases were mentioned—2 Wils. 257; 1 B. & P. 267; Cro. Eliz. 533; Reeves on Shipping, 196 *et seq.*

Per Curiam.—Rule absolute for new trial.

JONES, *qui tam*, v. CHACE.

On debt *q. t.* on the imperial statute 6 Geo. IV., c. 114, which gives the penalty $\frac{1}{3}$ to the King, $\frac{1}{3}$ to the Lt. Governor, and $\frac{1}{3}$ to the person suing, the court refused to arrest the judgment. on the ground that the plaintiff claimed the penalty for himself and the King only, not naming the Lt. Governor. An action of debt will lie on that statute to recover the penalty.

DEBT *qui tam* by the Collector of the Port of Brockville for a breach of the statute 6 Geo. IV., c. 114. The plaintiff sued as well for our sovereign lord the King as for himself, for £600. For that whereas on, &c., at, &c., certain persons unknown were employed with a horse and cart removing goods illegally imported; and while so employed two persons, deputies of plaintiff, seized the same, and that defendant, contrary to the statute, opposed and molested the said deputies, and rescued the said goods, whereby and by force, &c., an action hath accrued to plaintiff, as collector as aforesaid,

to demand of defendant £200, parcel, &c.; second and third count each for £200, varying the statements. Breach.—Yet defendant (though often requested) hath not paid to our sovereign lord the King and plaintiff, as collector as aforesaid, who sues as aforesaid, or either of them, the said sum of £600, or any part thereof, but to pay the same or any part thereof to them or either of them hath hitherto refused, and therefore, as well for our said lord the King as for himself, plaintiff, as collector as aforesaid, brings his suit.

Plea.—That defendant does not own to our said lord the King and plaintiff, who sues as aforesaid, or either of them, the said sum of £600, or any part thereof in manner and form, &c., concluding to the country whereon issue was joined. There was a verdict for the plaintiff, and in Michaelmas Term last *Bidwell* moved in arrest of judgment on two grounds. 1st, That an action will not lie by the plaintiff (not being a party grieved) upon this statute, but that the penalty can be recovered only by information. 2nd, That the plaintiff prays the penalty for the King and himself, contrary to the provisions of the statute which gives one-third to the collector for the King's use, one-third to the Governor of the colony, and the other one-third to the person who shall inform and sue for the same.

This term the *Solicitor-General* shewed cause, and *Draper* replied.

CHIEF JUSTICE.—The penalty for which this action is brought is imposed by the imperial statute 6 Geo. IV., c. 114, sec. 52, which says that “the person

committing such offence shall forfeit the sum of £100." The 57th section enacts that all penalties and forfeiture shall and may be prosecuted, sued for, and recovered in any Court of Record having jurisdiction in the colony where the cause of prosecution arises. The 59th section enacts that no suit shall be commenced for the recovery of any penalty under the statute, except in the name of some superior officer of the customs or navy or other person employed (to seize and secure, &c.), or of his Majesty's advocate or Attorney-General for the place where such suit shall be commenced.

The 68th section enacts that all penalties and forfeitures recovered under that statute shall be divided as follows :

After deducting the charges of prosecution, one-third part of the net produce shall be paid into the hands of the collector of customs, at the port or place where such penalties or forfeitures shall be recovered, for the use of his Majesty ; one-third part to the Governor or Commander-in-Chief of the colony or plantation ; and the other third part to the person who shall seize, inform, and sue for the same.

The 69th section enacts that all actions or suits for the recovery of any of the penalties or forfeitures imposed by this act, may be commenced or prosecuted at any time within three years after the offence committed, by reason whereof such penalty or forfeiture shall be incurred. The action is brought by the plaintiff, "who sues as well for our said lord the King as for himself in this behalf," and the record

after the statement of the offence concludes thus, "whereby an action hath accrued to the said William Jones, who sues as aforesaid, to demand and have of our said lord the King and for himself the sum of £200," &c.

It is objected in arrest of judgment—1st, That an action will not lie by the plaintiff (not being a party grieved) upon this statute, but that the penalty can be recovered by information only. 2nd, That the plaintiff prays the penalty for the King and himself, contrary to the provision of the statute.

Upon the first objection. This action cannot be said to be brought by a common informer, but by an officer who is expressly authorised by the act; and further, the words "action, sue for, recover," in the 59th, 68th, and 69th sections, if they were extended by the statute to common informers, which they are not, would undoubtedly enable such common informers to bring debt, though they might not authorise him to proceed by information. They clearly, however, enable the present plaintiff to bring debt. Com. Dig. Debt E. and 5 East. 313, shew this clearly.

Upon the second objection there may be more room for doubt. In support of it the authority most relied upon is in Hobart 245. The case is not reported as having been decided, but Lord *Hobart* intimates his opinion, and probably there have been few judges whose individual opinions would have more weight. That was an information for penalties under a statute which gives £5 for each offence, and

divides the penalty into three parts—one for the king, one to the poor of the parish, and one to the informer. The informer claimed the moiety for himself. Lord *Hobart* thought the information bad, and says that in an information as in an action the party suing should demand his due, which it is his office to demand certain, and not the court to decide; therefore if he makes no demand, or demand what appears not to be his due, his information is insufficient.

A case more directly in point is in 2 Keb. 820; in debt *qui tam*, on stat. Eliz. ch. 2. It demanded for the king and for the “informer, and said nothing of the third part, that is to the poor, *sed non allocatur*, for being debt the poor cannot sue, but their part shall be severed in the judgment. Contra in an information which may be *pro domino rege pro seipso et pauperibus sed adjornatur*.”

Upon looking to the 1 Eliz., ch. 2, the act for the uniformity of the Common Prayer, I find there is no provision in it upon which such an action could have been brought. However this may be accounted for, *Keble* is not an authority to be so safely relied upon as Lord *Hobart*, and especially when he does not report a final decision. If therefore the cases were contradictory, as at first they appear, it would be difficult to decide against that in *Hob.*, but that case is clearly not the present case. Here the plaintiff claims the whole penalty—he is entitled to recover it—he says an action hath accrued to him to demand the penalty, the £200 for the King and himself, but he does not pray a moiety as in *Hob.* He

prays judgment for the whole, but suggests that it is for himself and for the King, which the statute overrules. The plaintiff may rightly have his judgment for the whole penalty, and the part of the Governor may, as is said in *Dickenson and Clare*, be severed in the judgment. Several cases support this opinion—1 *Jones*, 156; *Cro. Car.* 330; *Burr.* 2021; *Parker*, 105; 1 *Andrews*, 139; 2 *Mod.* 100; *Hardw.* 185; *Hawk. P. C. b.* 2, ch. 26, sec. 17, 20, 76.

Although I do not think that all the cases on this point are strictly reconcilable, I consider that the weight of authority as well as the reason of the thing requires that the rule to arrest the judgment should be discharged, though certainly my first impression was contrary.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Curiam.—Rule discharged.

FERRIE v. TANNAHILL.

When defendant had an attorney upon whom several services of papers were made, the court set aside the assessment of damages because the notice was given to defendant and not to his attorney.

The court set aside the assessment of damages in this cause under the following circumstances:—The defendant had been arrested, and employed an attorney to put in bail, on whom the declaration, demand of plea, &c., were served; judgment by default was signed for want of a plea, and notice of assessment given to the defendant himself, but none to his attorney, which the court held to be irregular, and held

that no notice of intention to move to set aside the assessment was necessary.

Solicitor-General for plaintiff, *Draper* for defendant.
Vid. 2 Y. & J. 276, in point.

FISH v. DOYLE.

An indenture of apprenticeship, though contrary to the provisions of 5th Eliz., c. 4, is not void, but voidable only. Semble, that the 5 Eliz. is not in force in this province.

COVENANT on articles of apprenticeship against the defendant as surety. Breach.—That the apprentice did unlawfully absent himself. Pleas.—*Non est factum*. And 2dly.—That the apprentice was an infant, and that the articles were made for a less term than seven years, to wit, for the space of three years, contrary to the form of the statute, and that the apprentice did of his own free will absent himself from the said service, by reason whereof the said articles were void. Demurrer and joinder in demurrer.

Sullivan, in support of the demurrer, argued that the circumstances of this country at the time the English law was introduced shew that it is impossible that the legislature could have meant to introduce and give force to the statute 5 Eliz., ch. 4.

Draper, contra, said the question was whether the statute 5 Eliz. was in force here. If it was, he then relied on the cases 1 Anstr. 256, and 6 Esp. 8.

CHIEF JUSTICE.—I am of opinion that judgment should be given for the plaintiff on this demurrer. Setting aside the question whether the 5 Eliz., ch. 4,

is in force in this country, the plaintiff is, I think, entitled to prevail, although there are in some cases strong intimations of a contrary opinion upon one of the objections. The deed of an infant, though voidable on account of his infancy, is to be avoided by himself and not by a third person who covenants that he will perform a contract which is manifestly for his benefit.

Thus far I consider the case clear. Then so far as regards the deed being void under the statute of Elizabeth on account of the apprenticeship being for a less term than seven years, it is decided, as I conceive, by the weight of authorities (and the cases upon the question are numerous) that the deed is not void but voidable; that the infant may not avoid it by a mere infraction of the articles during that period of service, and if so, it would follow that the person who covenants for the infant could not discharge himself from his covenant by pleading that the deed is absolutely void. This statute has never been a favourite in English courts, and as Lord *Kenyon* has remarked in one of the cases, the judges soon after its passing "construed it away." I confess, however natural might be the desire to lean against the provisions of such a statute, I should feel it more easy to coincide with the opinion intimated by Lord *Ellenborough* at *nisi prius*, in 6 Esp. N. P. C. 9, than to reconcile myself to the reasoning of the many cases which have established the doctrine above mentioned.

If it were necessary, however, to decide on those cases alone, they have, I think, settled the question

that the defence as pleaded here would not have availed in England while the statute of Elizabeth was in full force; 5 T. R. 716; 3 B. & A. 59.

The provisions of the statute which are relied on in the plea are no longer part of the law of England; they have been repealed as impolitic, even in the condition of that populous country (54 Geo. III., ch. 96.) In my opinion those provisions were never part of the law of this province; I have no objection to express that opinion, although it is not necessary for the decision of this question.

SHERWOOD, J., concurred.

MACAULAY, J.—It is unimportant to the demurrer whether the 5 Eliz., ch. 4, is in force or not. If it is in force, then the articles do not come within it, are not sustained by it, and may therefore be treated as if there were no act; not being void but voidable only under the statute, and equally so at common law, 2 Str. 1066; Hardw. 323; Burr. sett. cases 91; Burr. 6. Articles in England not sustained by the statute are to be regarded not as void but as at common law, and the consequence of a case not being within the act is that the common law rights of the infant subsist uninfluenced by legislative provision. All the authorities therefore upon cases held not within the 5 Eliz. apply and should govern this case. 2 H. Bl. 511; 6 T. R. 556; Burr. 1801; 2 T. R. 160. The cases are not uniform, but tend to establish that articles of apprenticeship are voidable by the infant but not void. Other authorities show that in such cases the covenants of third parties to

ensure performance are not void but broken by an act of avoidance by the infant, however in his discretion if contrary to the terms of such covenant. See 1 Saund. 312; 1 Sal. 68; 2 Ld. Raym. 1017; 2 T. R. 766; 4 T. R. 769; 8 Ea. 26; 9 Ea. 295; 3 M. & S. 190; 7 T. R. 121; 4 Taunt. 876; 7 B. & C. 568; 8 Mod. 190; Doug. 518.

Per Curiam.—Judgment for plaintiff.

REX. v. SHERIFF OF NIAGARA.

An attachment against a sheriff for not obeying the rule to bring in the body cannot be granted by a single judge at Chambers.

A rule *nisi* had been obtained in a former term for an attachment against the sheriff for not obeying a rule to bring in the body, which was made returnable before Mr *Justice Macaulay* at Chambers in vacation, who, on hearing the parties, granted the rule for the attachment. The *Solicitor-General* moved to set aside the attachment for several alleged irregularities, and the case was argued at great length by him for the sheriff, and *Draper contra*, when a question arose as to the regularity of granting the attachment by a judge, at Chambers in vacation; and on this ground the court, after taking time to consider, set it aside without costs. (a)

(a) By Common Law Procedure Consol. Stat. U. C., ch. 22, sec. 280, an attachment may issue in vacation on judge's summons and order.

KILBORN v. FORESTER.

A. having a claim on the government for certain wild lands, gave a bond to B. to procure the patent for the same in B's. name, on condition that B. should pay him a certain stipulated sum on a fixed day. He did so obtain the patent, and informing B. of it, requested payment. B. without refusing, put it off, and afterwards an action of assumpsit was instituted to recover this money, in which the plaintiff declared, among other things, for the value of lands sold and for services rendered in procuring letters patent to B. granting him certain lands in fee simple. *Held* that A. could recover.

ASSUMPSIT.—The declaration contained several counts; one for the value of lands sold by the plaintiff to the defendant; another for services rendered by the plaintiff to the defendant in procuring letters patent from the Crown, granting him certain lands in fee simple. At the trial the following facts appeared in evidence: Kilborn, who seems to have had a claim upon government for a lot of land which had not yet passed into a patent, stipulated with Forester to assign the lands to him, and executed a bond, dated 11th August 1827, binding himself to procure the King's letters patent for the lands in question, to be issued in the name of Forester, and to deliver him the patent on or before the 1st day of August 1829, provided Forester should have well and truly paid him £101, 4s. 7d. on or before that day. This bond he delivered to Forester, who produced it at the trial upon a notice given for that purpose. Kilborn further proved that within the period he did procure the letters patent in the name of Forester for the lands mentioned, and gave Forester notice of it and offered to give him the patents; Forester however told him he might keep them till he should see him again. To this evidence the defendant's counsel took these exceptions—that the bond produced contained nothing binding on him, and does not bear his signature—that no other writing

was produced, and that he cannot be charged "upon any contract or sale of lands, or any interest in or concerning them, nor upon any agreement not to be performed within a year from the making thereof," unless upon proof of an agreement in writing, or a memorandum or note thereof signed by him as the party to be charged, or by some person thereunto lawfully authorised by him—that the action cannot therefore be sustained.

In Michaelmas Term last the case was argued on these points, the verdict having been given for the plaintiff, subject to the opinion of the court upon them.

Judgment was not given till this term.

CHIEF JUSTICE.—This case is one arising out of a description of dealing very common in this province, where, from the low price of real estate, the frequent transfers that are in consequence made and the bargains to which that kind of traffic gives rise are not accompanied with the same cautious circumspection that attends such transactions in older countries. No ground appears in evidence on the part of Forester for repudiating this contract—no failure is imputed to Kilborn—it is not pretended that Forester has not the full benefit for which he stipulated, and no reason is assigned (besides the legal exceptions upon which the case turns) why he should not pay Kilborn the sum agreed upon, or at least the fair value of the lands. Forester, it is plain, under the letters patent which were produced at the trial, holds a title by matter of record to the land mentioned in the bond.

The patent has the legal effect of giving him an absolute title in possession. No impediment to the enjoyment of the real estate is suggested, nor any fraud or unfairness on the part of Kilborn.

Although the points raised are very important in their bearings upon a multitude of transactions in the country, this case is not one of very particular moment in itself; the object in litigation is not large; for all that appears, Forester has received an estate for which he ought to pay, and the justice of the case as it stands before us is plain, and is evidently with the plaintiff; but the remedy is sought in a court of law, and it is objected that in consequence of the Statute of Frauds certain legal evidence is necessary, without which the remedy cannot be obtained here, whatever may be the real merits of the case. If we find this to be so, the objections must prevail, however hard may be the consequences; for we must enforce the statute with the same regard to its letter on the one side and the same attention to its spirit on the other as have governed the decisions of courts of law in England.

If the facts which appeared on the trial were not made out by that description of evidence which the law requires in order to support a case upon such a claim, then we must discharge our minds of the facts as entirely as if they never existed, and if the plaintiff for this reason is defeated of his remedy in this court, and having no other jurisdiction to apply to, shall remain without redress, the fault is in himself in neglecting to take proper precaution in this business, though he may be regarded as unfortunate in

there being no Court of Equity here which can afford redress. I make this observation because I disclaim the idea of venturing upon any consideration to deny to the Statute of Frauds whatever effect would, in my opinion, be given to it by the courts of common law in England. We are clearly to construe that act as strictly as it is there construed in courts of law—to carry its provisions into effect in this country with more rigorous exactness would, in my opinion, be exceedingly injudicious and unjust, as well as illegal.

To determine this case satisfactorily it is necessary first to consider whether, if Forester had so recognised the bond by his signature as to comply with the Statute of Frauds, there is such an agreement expressed or implied in it as can support this action. It is true there are not in the bond any words expressly obligatory upon Forester, for the bond was meant to be and is the bond of Kilborn, and of him alone; the language consequently is such, that if Forester had sealed it no declaration could be framed on it charging him in debt on bond.

To show a right to the penalty of an obligation the party must bring his case within the letter of the condition with strict legal precision; but without reference at present to the question of signing, covenant will lie upon specialties, and assumpsit upon written agreements, whenever the fair understanding of what is written will raise or imply an undertaking. I take the fair and unreasonable interpretation of the transaction disclosed in the bond to be this, that Kilborn bound himself to procure for Forester the pa-

tents on or before the 1st August 1829—that he had until that time to obtain them—that it was not to remain optional with Forester whether he would accept them or not, but that the payment of the money was an act as much incumbent upon him as the procuring the patents was upon the other. In other words, I think that Kilborn was not bound to wait till Forester paid the money, from any uncertainty, whether the contract was mutually binding or not, but that he might proceed to enable himself to fulfil his part of the bargain, and that when he had done so he had an absolute right to enforce from Forester the payment of the price agreed upon, though he could not bring his action to compel him until the 1st of August had arrived, that being the day mentioned for the convenience of both parties. I think this point clear upon the authorities respecting conditions concurrent or precedent, many of which were considered and cited in this court in the case of Baker and Booth. If this case comes within the Statute of Frauds, and if upon adjudged cases the signature of Forester can be considered as supplied under the circumstances, then I think the nature of the contract raised by the bond given by the one and received by the other is such as I have stated. If the Statute of Frauds should be thought not to apply under the circumstances of this case, then no agreement or memorandum, or note of any agreement in writing, would be necessary, and it would remain for us to consider whether upon all the evidence an implied assumpsit would not be raised against Forester to pay for the estate he had received the sum mentioned in the bond, or its fair value to be allowed by the jury. I think an assumpsit would be raised.

Now with respect to the Statute of Frauds. This case does not turn upon a part performance merely, which might have the effect of placing the plaintiff in such a situation that he could not be restored to his original rights, while at the same time it left an agreement still open and incomplete on both sides, to which a recourse might be necessary in order to give either party the full benefit for which he stipulated. If the case were so situated, it might then be necessary to determine whether a court of law consider part performance as taking a case out of the statute. Upon that point the case in *Brown's Ch. Ca.* 417, and the very strong language used by Lord *Mansfield* in the case of *Simon and Moltivos*, and by Mr. *J. Buller* in *Brodie and St. Paul*, 1 Vesey Junr., might be found to be contradicted by such a weight of authority as to make it unsafe to adhere to the doctrine they lay down in its fullest extent. I do not, however, express any such opinion at present, for it is not necessary, and I should reluctantly bring myself to that conviction. In this case, however, the plaintiff has done all he engaged to do—on his side the contract is executed. The defendant holds the land, and why is he not to pay for it? The statute was made to prevent fraud. I do not conceive the legislature can be supposed to have intended that in consequence of its provisions one man ought to receive an estate from another and hold and enjoy it for nothing, and tell him it is true you have bound yourself to procure me a title to an estate for £100, and that I accepted your bond, and that you have fulfilled it and given me the estate, nevertheless, as you trusted to my honesty and took no undertaking in writing from me to pay for it, I

will keep the estate for nothing—I will not only not pay you the particular sum you demand, because you can shew no agreement in writing for that particular sum; but further I will not pay you anything, because you can shew no agreement signed by me binding me to do so. I do not so construe the Statute of Frauds. I admit that whenever either party can have no cause of action except upon an agreement, then he cannot prove his agreement otherwise than the statute requires; but I conceive the circumstance may be such as to imply an assumpsit, without the necessity of any special agreement, and that in such a case the statute will not preclude a plaintiff from recovering the value of the estate he has transferred. Suppose by deed poll to which he only is a party A. conveys an estate to B., and mentions in his deed that it is in consideration of £50 paid, and of £100 to be paid by B., in a year from the date, could it be contended that B. could take this conveyance and enjoy the estate, and that upon being sued for the £100 he could produce this deed at the trial, as the bond was produced here, and yet say you can shew no agreement signed by me the party to be charged. The Statute of Frauds protects me in this case, in which there could be no fraud. I will hold the land, and you shall lose your money. To say nothing of any distinction between contracts executory and not executory, there have been many cases in which courts of law have departed from the strict letter of the Statute of Frauds, grounding that departure upon the principle that the danger of fraud in those cases did not exist.

Again, it is said sales under the direction of a master in Chancery are not within the statute, be-

cause there can be no danger of fraud in a transaction under the sanction of the court. Where, then, is the danger of fraud in the present case? Kilborn has given Forester his bond to bind himself to his part of the agreement; under it Forester has received the estate. There can be no doubt as to the terms so far as the bond exhibits them, nor any danger of fraud as to the terms of that bond, because the defendant has sanctioned its authenticity by accepting it, and by holding it as compulsory upon the opposite party. The only possibility of fraud in such a case that I can see is the possibility of Forester's defrauding Kilborn of the purchase money. He seems to think he can do it under cover of a statute made to prevent frauds; but he should remember that the statute (as great judges have said) is to be used not as a sword but as a shield, and that, as was observed by the court in 3 Burr 1919, the statute being passed to prevent fraud, it shall never "be so turned, construed, or used as to protect or be a means of fraud."

If the estate had not been conveyed by the one and received by the other, and if the parties were litigating upon an alleged agreement, either of them charging the other for not conveying, or for not accepting and paying for it, then it is clear the Statute of Frauds would preclude any recovery upon such an agreement unless it were in writing and signed; but here the act is done; the question is not as to the agreement about it, but the legal consequences of it, and the obligations arising from it. I do not, however, state it to be my opinion that an agreement is not in this case supplied by the evidence, supposing an agreement necessary.

Because the title procured, which in its nature confers a title in possession, the bond is evidence of the terms on which it was procured. It is true it is not signed by the party charged, but I have a strong conviction that his acceptance of the bond, and receiving under it the full benefit he stipulated for, ought to be taken as equivalent to his recognising it by his signature. Many cases might be quoted in which this principle is advanced, though not with particular reference to the Statute of Frauds. With reference to that statute, and upon this particular point, I will advert to what is said by the court in a case reported in Lofft. 332. The case is obscurely reported, but the sentiments of the judges are clearly given upon that question, and they confirm the position I have stated. See also 4 Moore, 542; 6 More, 119.

I have not yet felt it necessary to consider the objections on the two points of the 5th sec. of the statute separately, because the same reasoning applies to both; nor have I lost sight of the arguments that the declaration might be sustained by considering the procuring the patent as a service rendered, if a remedy could not be obtained by suing as upon a sale of land. If the plaintiff were driven to maintain this construction, and if it were not open to the same exceptions on the statute, I should feel every inclination to support the verdict in that way, but I consider it legal on the other and more obvious view of the transaction.

The examination of the various decisions on the Statute of Frauds has led me to deduce from them

the principle I have stated. I have not been free from doubt, and am not now, but my opinion is that the verdict is supported by the evidence, and as was well expressed by Mr. J. *Buller*, 1 Ves. Junr. 421, "I will only say, that if I err I will take care, as far as is in my power, to err on that side on which justice lies." I must also add, that if under such circumstances as these the statute were to preclude a recovery in a court of law, any country which like this has not a Court of Equity would, in my opinion, be much better without a Statute of Frauds, for I think it was truly said by Mr. Justice *Wilmot* (Bl. Rep. 601), sitting in a court of law, "had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting rather than by preventing frauds."

I am of opinion that the *postea* should be delivered to the plaintiff.

SHERWOOD, J.—I think judgment in this case should be entered for the plaintiff. In my opinion the intention of the legislature in making the Statute of Frauds was to prevent those fraudulent practices which are usually attempted to be supported by perjury, and in order to prevent them the statute requires that the terms of contract shall be reduced into writing, or that some other requisite should be adopted to prove beyond a doubt that the contract was completed. I think it was the object of the statute to prevent a recourse to verbal testimony to prove the terms of the contract upon which the plaintiff seeks to recover against the defendant. This

objection must always hold good so long as the contract remains open and executory, but when the requisites of the contract have been complied with by both parties in all essential points, it is then executed, and I think no longer liable to the objection before mentioned. The case is then out of the statute, there is no danger of mistaking the terms of a contract, because the parties themselves by their own acts have recognised the contract and ascertained the terms.—Gow. N. P. C. 109.

In the present case I think the contract was executed. The plaintiff procured a government deed for the defendant of the land, and the defendant approved of it, and said he would take the deed. The defendant was therefore the owner of the land and in legal possession of it by virtue of the King's deed. The amount of the price of the land is fully proved by the bond given by the plaintiff to the defendant, and therefore the jury had sufficient to enable them to ascertain the measure of damages.

MACAULAY, J.—It would seem the plaintiff accepted of the defendant a bond, dated 11th August 1827, conditioned that if plaintiff should procure from the government of the province a patent, to be made out and issued for certain specified lands, on or before the 1st August 1829, providing defendant should have paid him £101, 4s. 7d. on or before the same day, then the obligation should be void. That in pursuance of such bond the plaintiff did procure patents for the lands in question, to be issued in the name of defendant, such patents bearing date upwards of a year subsequently to the date of the obli-

gation, namely, the 11th October 1828, and that by reason of the non-payment of the sum mentioned in the condition this action is instituted. The declaration is for a messuage and tenements bargained and sold, work and labour generally, the money counts, and an account stated.

Without delaying the case till next term, which I am unwilling to do, my learned brethern being in favour of the verdict, I could not go at any length into the case, or examine in detail the arguments and considerations which suggest themselves. As at present advised, the matter appears to me to lie within a narrow compass. The evidence, I think, imports a contract or sale of lands, or an interest concerning them, or an agreement not to be performed within a year from the making thereof, in either of which events it is required by the Statute of Frauds that such agreement, or some memorandum or note thereof, should be in writing, and signed by the party to be charged therewith, &c. At the trial the plaintiff failed to shew any agreement, memorandum, or note in writing signed by the defendant, and consequently however in other respects the facts disclosed might be deemed sufficient to sustain an action, or however a Court of Equity might effectually interpose, I am of opinion that applying the evidence to the present record, a nonsuit should be entered for the foregoing reasons, did no objection exist to the form of the pleadings.

I have not been able to satisfy myself that upon the footing of part performance, or any other principle grounded upon the presumptive fraud of the party

charged, or upon the merits of the plaintiff's claim, the present suit can be legally sustained upon the evidence adduced, consistently with the terms of the statute. As the moral right to recover is to me nevertheless manifest, I am glad my learned brothers take a more favourable view of his legal resources. And it is not without much diffidence and great mistrust of my own judgment that I feel constrained to differ from them. I shall be extremely happy if my future researches justify me in adopting an opinion different from that which I at present entertain.

Per Curiam.—(Diss. MACAULAY, J.)—*Postea* to the plaintiff.

EASTER TERM, 1 WM. IV., 1831.

Present :

THE HON. JOHN BEVERLEY ROBINSON, Chief-Justice.

“ LEVIUS PETERS SHERWOOD, Judge.

“ JAMES BUCHANAN MACAULAY, Judge.

ROCHLEAU V. BIDWELL.

The recognition of a bond in a letter from defendant to plaintiff, with proof that a document purporting to be a copy or draft of such an instrument was shewn by defendant with the title deeds of an estate to which it related, affords evidence to go to a jury in proof thereof after notice by defendant to produce, and a failure to defendant to produce any bond, copy, or draft.

Several documents may be construed together as evidence of an agreement or note in writing under the Statute of Frauds. A conveyance in fee from plaintiff to defendant, with absolute covenants for title, but not for further assurance; a bond to defendant for further assurance at a fixed period on receiving an additional sum, and interest, with a subsequent written offer from defendant to plaintiff, to purchase another property, on paying a portion down and the residue at a future period, receiving a bond from plaintiff like the former bond for a deed of confirmation as in the former bond, held under the facts proved and found by the jury to constitute an agreement, or note, or memorandum thereof, within the statute, on defendant's part, to pay the sum specified in the bond and interest, on defendant's tendering a confirmation and demanding the same.

Semble, that when to pleas of no agreement or note in writing, and also an agreement not to be performed within a year to the same count of the declaration, an agreement was replied to the first plea, and a note or memorandum replied to the second, and sufficient evidence of a note or memorandum is given, the plaintiff is entitled to judgment on the whole record, though such evidence might not amount to substantive proof of an agreement.

ASSUMPSIT.—The declaration contained two special counts on a sale by plaintiff to defendant of a house and land in the town of Kingston, setting out in terms a special agreement that in consideration that plaintiff had sold the estate to defendant, defendant undertook to pay plaintiff £265, with 5 per cent. interest thereon, after the 13th April 1829, if plaintiff should after the said 13th April make and execute to de-

defendant a deed of confirmation sufficient to confirm and secure to the defendant a legal title in fee to the premises; and that after the 13th April plaintiff did execute, &c., a sufficient deed, &c., and tendered the same to defendant, and required him to pay the said sum of £265 with interest, yet defendant refused to accept the deed and to pay the money, &c.

2nd count.—That it was agreed between plaintiff and defendant that plaintiff should sell to defendant, for considerations thereafter mentioned, a certain other house and land, and that plaintiff should execute a deed of bargain and sale to defendant for the consideration of £335, and that after 13th April 1829 plaintiff, upon payment to him of £265, with 5 per cent. interest, should execute to defendant a deed of confirmation sufficient to confirm to defendant a legal title in fee, and that defendant should pay the said sum and interest, on the delivery of the said deed. Mutual promises are then laid, and although the defendant in part performance paid the £335, and although plaintiff executed a deed of bargain and sale, &c., and after the 13th April executed a sufficient deed of confirmation, &c., and tendered the same and requested defendant to pay the £265, and interest, in all £423, 15s., yet defendant did not nor would, &c. The common counts were added.

The defendant pleaded, 1st, the general issue, and 2nd, the Statute of Limitations; 3rd, after reciting the Statute of Frauds requiring agreements respecting the sale of lands to be in writing, that there never was any such agreement, or any memorandum or note thereof in writing and signed by the defendant as in the first count, &c.

4th to 1st count, reciting the Statute of Frauds requiring agreements not to be performed within a year to be in writing, that the action is to charge defendant with an agreement not to be performed within a year, and that neither the said supposed agreement nor any memorandum or note thereof, nor the supposed promise of defendant, ever was in writing.

5th to second count similar to third plea.

6th to second count similar to fourth plea.

7th to first count that neither of the agreements were in writing, &c.

8th to second count similar to the last.

Replication to first plea joins issue.

To 2nd, that action did accrue within six years.

To 3rd, *precludi non*, because the said agreement, promise, and undertaking, was made in writing and signed by defendant, concluding to the country. To 4th, *precludi non*, because a memorandum or note in writing of the said agreement, undertaking, and promise of defendant, was made in writing and signed by defendant, concluding to the country. To 5th and 6th same as to 3rd and 4th. To 7th, *precludi non*, because although true it is neither the undertaking or promise of defendant in said first count mentioned, nor any memorandum thereof was in writing and signed by defendant, yet plaintiff says that at the time of making the said promise in the first count mentioned, plaintiff in part performance executed a conveyance or deed of bargain and sale in fee of the

said land, &c., under which the defendant entered into possession, and so continued from thence hitherto to the great loss of the plaintiff. To 8th plea, that there was a memorandum or note of the said agreement in the second count mentioned in writing, &c., concluding to the country. The defendant joined issue on all but the replication to the seventh plea, to which he demurred and joinder in demurrer.

The cause went down to trial and to assess contingent damages on the demurrer at the last Midland District Assizes, *cor. Macaulay, J.* The plaintiff proved a notice to procure bond, paper, &c., but no bond was produced. A paper, purporting to be a copy of a bond, was then produced and shewn to plaintiff's first witness; it was in plaintiff's handwriting, and witness saw it in plaintiff's possession in October or November 1825. He never saw a similar bond in defendant's office, but he saw a paper something like a copy which was also in plaintiff's handwriting. It did not appear to be signed or witnessed. Defendant, when lecturing witness on conveyancing, said in illustration of the deeds essential to constitute a valid title, that on occasion of his purchase from plaintiff, plaintiff had tendered him a bond similar to the copy, but that he did not want it and rejected it—his title was perfect without it. That paper witness thought was signed by plaintiff, but it had no seal attached; never saw the paper but once. It was a copy only, and was handed by plaintiff to defendant, as defendant told witness. Defendant said he never had assented and never would consent to such a bond. Is confident it had no seal, and was neither executed nor witnessed. Defendant shewed witness other papers, receipts, &c.

The next witness recollected being called upon to witness papers in 1818 at Mr Washburn's office, next door to which he lived—he witnessed three or four papers—has seen the deed from plaintiff to defendant for the premises defendant now lives on—could not say whether there was a bond. One or two papers were read, but he had no recollection of a bond being read, nor of any paper being exhibited said to be a bond, nor had he since seen any paper which he then witnessed that is a bond. None of the papers he witnessed were printed—he thought one paper was drawn up while he was in the office.

The attorney for the defendant was next called, and gave testimony only to his knowledge not acquired through professional and privileged communications. He knew of no bond—never saw a bond from plaintiff to defendant, nor any agreement—never heard of any arrangement such as that suggested by the plaintiff—could not say there was any bond.

Another witness who had been a clerk in defendant's office was called. He knew of no bond—had no impression of any such bond: plaintiff often told him there was a bond, and abused defendant for cheating him, &c. The deed of confirmation was proved, and a tender of it to defendant, who refused it. It was then proved that plaintiff's father died in possession, and that plaintiff is his eldest son. The will of plaintiff's father was produced, but not received, there being no subscribing witness produced to prove it. A note in the handwriting of defendant was put in, dated 22nd May 1818, addressed to

the plaintiff, in these words:—"You said the other day you wished to find somebody who would buy your house (the stone one I suppose you meant), on the principle of paying about a thousand dollars down, and the residue when you should give a deed of confirmation at the age of 35, on which principle you said you would dispose of it very low, but did not name a price. Will you gratify my curiosity so far as to name your price."

Other notes were produced, written by defendant about the same time, to the plaintiff, which shewed that he was in treaty for the premises, but contained no new proposition. A copy of the deed was produced and admitted, dated 22nd June 1818, conveying the premises in question in fee simple absolutely, for £335. No receipt for the purchase money was endorsed, and it was executed by plaintiff alone. The second witness called by the plaintiff was one subscribing witness. The other is dead. On the back of the deed is a writing, signed and sealed by plaintiff and defendant, referring to the deed, and stipulating that a lease of the house which had been made till May next should remain. That plaintiff should receive the rent, and that his wife should, within four months, duly bar her dower. In the deed the plaintiff is described "as devisee of Francis X. Rochleau, deceased." Another note, written by defendant to plaintiff, was also put in, dated 29th October 1818, from which it appeared that defendant having purchased part of the house and land upon the bargain which gave rise to this action, desired to purchase the remainder. The note is in these words—"Dear Sir—Upon calculating

my means of payment, I have concluded to make you the enclosed offer for the purchase of the other part of the stone house, but would have it to be understood that I am not to be bound by this offer unless accepted and carried into execution this week, as I have otherwise occasion for a different appropriation of the money." Inclosed was a paper in the same handwriting, in these words—"A present deed from F. R. to B. B. of the other part of the stone house, with immediate possession, for the consideration of £200, to be paid as follows:—£50 to be paid down in cash to the said R. upon the execution of the deed; £150 to be paid in satisfying debts to that amount; the said B. to satisfy such debts as soon as he pleases, but the notes or evidences of the debts satisfied and discharged not to be delivered over to said R. until the bar of dower shall be acknowledged. A bond (like the former bond) for a deed of confirmation upon the payment of £200, and interest, as in the former bond." This was the plaintiff's case. The defendant moved for a nonsuit on the ground that there was no evidence to sustain the case.

Macaulay, J., left it to the jury to say whether under the evidence they found that defendant accepted from plaintiff a bond such as was suggested, or a paper of similar import, signed by plaintiff, though not sealed; and if they found either, to say which; and if they so found to give a verdict for the amount claimed, subject to the opinion of the Court of King's Bench upon two points—first, whether there was evidence to go to the jury to sustain the case, including all the facts material to be established.

Secondly—if so, whether the facts established sustain the action.

The bond (according to the copy produced) was dated 27th June 1818, in a penalty of £530, conditioned (after reciting the sale) that if plaintiff or his heirs after 13th April 1829, upon request of defendant, his heirs and assigns, and upon the payment or tender of the sum of £265, with 5 per cent. interest, by defendant, his heirs or assigns, to plaintiff or his heirs, should execute to defendant, his heirs or assigns, a good and sufficient deed of confirmation sufficient to confirm and secure to the said defendant, his heirs and assigns, a legal title in fee simple to the premises, then, &c. The jury found in favour of the plaintiff, on the ground that they find a bond executed by plaintiff and accepted by defendant similar in contents to the copy submitted. Damages £431.

And in Michaelmas Term last the cause was argued on the point raised by *Bethune* for the plaintiff, and the *Attorney-General* for the defendant. But the opinion of the judges was not given till to-day.

CHIEF JUSTICE.—(After particularly examining and commenting upon the evidence.)—I cannot say that no evidence was given to prove the existence of a bond or its contents, and as the surviving subscribing witness was called and examined, and that requisition of the law was complied with, the evidence which was given was legal evidence. Whether the evidence altogether was such as the jury ought to have been satisfied with is not now the question in discussion. If it were it would be necessary to de-

clare an opinion on that point. In forbearing now to do so, I desire not to prejudice that question by giving ground for any implication on either side. If the defendant had moved to set aside the verdict on the ground that it was contrary to the weight of evidence, and especially if he had strengthened that application by declaring on affidavit that no such bond had ever been given, that all the money had been paid, and that there was no justice in the plaintiff's demand, it would have remained for us to have exercised a sound discretion in determining whether the verdict of another jury should not be taken upon the ground that the evidence was inconclusive. At present we are not balancing evidence but giving judgment upon legal points reserved at the trial, the first of which (in the order in which I have considered them) is, that no legal evidence of a bond was given to the jury. Upon that I am, as I have already stated, of opinion against the objection.

The defendant next objects that if a bond such as is set up had really been executed by plaintiff and accepted by defendant it would constitute no sufficient evidence of a contract on which to charge him in this action, since it would not (in the words of the fourth section of the Statute of Frauds) constitute an agreement or memorandum, or note of an agreement in writing, signed by the defendant (the party charged), or by any person by him thereunto lawfully authorised. Upon this objection it is to be considered whether performance can be relied upon as taking the case out of the statute. It is also contended that the requisites of the statute have been complied with, that the bond constitutes a sufficient

memorandum or note in writing of the agreement declared upon, and that the signing is answered by the defendant's note of the 29th October, signed by him, &c., referring to the bond which he had not signed. This objection involves several legal questions, some of which seem to me to be not without difficulty, and to be placed upon grounds not perfectly clear and satisfactory by the various decisions which have taken place upon them. A constant struggle has been occasioned by the effort to maintain the general efficacy of the Statute of Frauds (which has been regarded as a very salutary act in the main), and at the same time to prevent an unjust and unconscientious use being made of its provisions in any particular case. So far as we can find certain principles established with regard to the construction and application of the statute, I hold myself bound *stare decisis*, and to adopt them, although they might seem to me, as some of them have to individual judges in England, to intrench upon the strict letter of the statute. I do not know whether in this argument it was intended to urge the objection of the Statute of Frauds to such an extent as to maintain that no action could be supported for the purchase money of a real estate, unless upon an agreement in writing, or some note or memorandum thereof. It is very certain that without such evidence nothing specific could be inferred in any action, either as to price or terms, nothing in short that would necessarily imply an agreement. But it does not therefore follow, in my opinion, that when the contract is not executory, but has been wholly executed on one side, the Statute of Frauds must in all cases nevertheless apply; as, for instance, when one party has made a title to another

of a lot of land, and even placed him in possession, without having received the purchase money, and sues merely for the value of the estate which the other has received, I do not at present admit that in the total absence of evidence as to any particular agreement it is in the power of the other party to retain the estate without paying for it, urging the Statute of Frauds as an objection to the possibility of recovering upon a *quantum valebant*. Goods may have been sold upon an agreement as to price and mode of payment that would bring the contract within that part of the fourth section of the Statute of Frauds which respects an agreement not to be performed within the year. If the vendor had delivered the goods, no question could arise under the seventeenth section; but if he should seek to avail himself of the specific agreement in order to obtain a stipulated price or a certain mode of repayment, he would be met by the fourth section, and be unable to recover upon his agreement, unless he could give that evidence of it which the statute requires, but would it therefore follow that the vendee could keep the goods for nothing because an agreement had been entered into, though in such a manner that it could not be legally proved? Would it not rather follow that in the absence of any specific agreement such as the vendor can sue upon, he may recover on a *quantum valebant* the value of the goods which the other has received from him? I do not wish, however, to be understood as expressing a settled opinion upon this point, especially as it respects the right of action for the purchase money of real estate, otherwise I should feel it necessary to consider the particular words of the statute, and to advert to some decisions bearing upon this view of the subject.

What I have said arises from a conviction upon my mind of the very important effect which such an application of the Statute of Frauds would have in this province, from the manner in which transfers of land have been frequently transacted. It does not seem to me that the question fairly arises in this case, for it is clear the plaintiff in the case before us cannot recover unless upon an agreement. He claims an additional sum to that which he acknowledges to have been paid at the time of his executing the conveyance, and whether we are to regard the sum claimed as a part of the original consideration yet behind, or as a sum to be paid as a separate consideration for the deed of confirmation spoken of, it is evident from the nature of the testimony that it is only by setting up an agreement to pay this particular sum that the plaintiff can recover. It is only on the footing of such an agreement that he has sought to recover or can hope to sustain his case, and that being so, the burden lies upon him to shew an agreement in the manner required by the Statute of Frauds, because I consider that any such agreement must necessarily fall within the fourth section of the statute. The part of that section to which I refer is not accurately worded, and indeed the want of precision and legal accuracy in the penning of this statute has been much noticed in decisions upon it. The words are, that no action shall be brought whereby to charge anybody "upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." From the word "contract" having a grammatical connection with the subsequent words "sale of lands," confining its relation to their subject mat-

ter, it seems natural to infer that the intention of the statute was to apply to any contract for the sale of lands, but be that as it may, as the statute reads, and as it has been construed, I consider the agreement set up in this case as coming within it. It is therefore to be determined, "whether the agreement on which this action is brought, or some memorandum or note thereof has been proved to be in writing, and signed by the party to be charged therewith." No question rises in this case as to the signature by an authorised agent. After examining the different cases, I think the bond found by the jury may be regarded as if signed by the defendant, in consequence of his recognition of it in the note of 29th October, which was signed by him. The case in 2 B. & P. 238, is strong to this point; 3 Br. Ch. Ca. 319; 1 Esp. N. P. C. 105; bears upon the same question, and it shews also to what extent the courts have been willing to go in giving a liberal construction to this statute. In 2 M. & S. 289, is a case in which the court held that the printed name of the vendor at the top of a bill of parcels made a sufficient signing to charge him with the bill of parcels as upon an agreement, because he had filled up in his own handwriting the name of the vendee, which was looked upon as an acknowledgment by him of the printed name as his signature. That the signature to an agreement which itself is not signed, may be supplied by a letter or other paper referring to it, and which latter bears the signature of the party to be charged, is clear upon the authority of several cases. This is treated as an undoubted principle of law in the respectable treatise on the statute by Mr. *Roberts*, whose reasoning and obser-

vations show much research and a familiar acquaintance with his subject. *Sugden* in his work on Real Property, and *Evans* in his edition of Pothier on Obligations, treat this as an admitted doctrine, and the cases are numerous on that point, and some of them, I think, are grounded on facts less conclusive in their nature than were in evidence here. The next question that arises is, whether if the signature of the defendant to the bond be supplied through the medium of the subsequent letter, there is in that bond any agreement upon which the defendant can be charged: it contains, it is said, nothing obligatory upon him: it professes only to bind the plaintiff to do certain acts: it was given to secure the defendant, and how (it is asked) can there be derived from its language any stipulation binding upon the defendant? That objection, it appears to me, is answered by many decisions which have taken place in similar cases, and indeed the statute itself allows reasonable latitude on that point. It does not require that there shall be an agreement signed by the defendant, but a note or memorandum of an agreement, a recognition, in other words, under his hand that he did agree, no matter whether verbally or otherwise, to the stipulation which forms the ground of the action. It is clear from cases in law and equity that it is not necessary the defendant should have signed a writing containing the language of an express undertaking on his part, such as covenant for instance could be maintained upon, if it were in a specialty.

The case in 1 Wils. 118, and 3 Atkins 503, is a remarkable one upon this point, for there the defendant signed a deed as a witness, not meaning to exe-

cute as a party, and not being a party to the deed, which was wholly between others; and yet, as he witnessed it with a knowledge of its contents, it was held to be a sufficient signing within the statute. So letters written to a man's own agent have taken a case out of the statute when they have contained a statement of certain terms to which he assented, or have referred to some other paper which contained them. The case in 3 Taunt. 169 is strongly in point to shew that the statute is not understood to require such an agreement in writing as would in its very language sustain an action against the defendant, and that it is not held to be an objection that the other party is not reciprocally bound by the agreement in evidence. I have met with another case in which a party having signed an arbitration bond, referring it to a third person to fix a value of an estate, was received as sufficient evidence of an agreement to bind him on a contract for the sale, although it is clear that the arbitration bond could in itself have constituted no contract of sale, nor have furnished any words of covenant or promise on which alone a declaration could be framed and supported. I think, indeed, no question arises here as to mutuality of obligation in the agreement alleged to be made by the bond and letters; for, in the first place, the defendant has the lands, and declares himself content with his title; and if he was not, the bond of the plaintiff as found by the jury obliges him to make the deed of confirmation; and this deed he did make and tender to the defendant.

There was another objection on which the defendant's counsel laid much stress. It was argued that

if the terms of the agreement can be taken as stated in the alleged bond, they are such as to defeat the present action, because they made it necessary that the defendant should have required the deed of confirmation, and the plaintiff has not alleged any such request. That, on the contrary, he has proved expressly that there was none, and that the defendant declined even accepting the confirmation when it was tendered, and cannot therefore be held liable to pay the money, which he was only to pay as a consideration for the plaintiff giving him that deed whenever he (the defendant) should request it. That argument appeared to me at the time in the same light that it does at present. Nothing is better established than that contracts are to receive a just and sensible construction; it would be useless to cite cases to this effect; I will only advert to 12 Ea. 470, which turned upon the construction of a provision in an indenture of lease, and in which the court say, "We think the true construction of this proviso is not according to the letter but according to the spirit, and that we may adopt the expression in Dyer, 15, *a*, that in every deed, and condition which are private laws between party and party a reasonable and equal intention shall be construed although the words sound to a contrary meaning." It appears plainly on the face of the bond, and by defendant's notes of May and October 1818, that the sum behind was part of the purchase money of the value of the estate, and a very considerable part, which the defendant, not being quite satisfied with the title the plaintiff could then give, determined to withhold for the present, and until the plaintiff should at his request give a deed of confirmation.

Indeed it would be a very strange and forced supposition to imagine that defendant was to pay £265 more than the actual value of the property in order to get a deed that he had a fancy to. The reason of the thing is apparent, and the very stipulation in the bond that interest shall be paid on the £265 shews that sum was not a mere consideration for a paper to be executed when the plaintiff was thirty-five years old, but was a part of the value of the land withheld till that period, and upon which therefore it was reasonable defendant should pay interest, as he enjoyed the estate. The mention of request I consider as having been inserted in the bond for no other purpose than to give the defendant an opportunity of hastening the performance by plaintiff, by making his request, or perhaps in order to shew it was the defendant who was to prepare and tender the deed; and it would be giving an iniquitous effect to those words to allow the defendant to say—"I don't want your deed; I am satisfied with the title you have already given me, and therefore I request no other, and will keep the estate and pocket the remainder of the purchase money." His waiving the deed is, in my view, equal to accepting it, especially when he declares that he waives it because he is satisfied with his title as it is. What is said in Comyns Dig. Covenant, A. 3, and in the cases there referred to, has no application to the circumstances between these parties.

I have had less doubt upon any of these points than upon the one which I will next proceed to mention. The deed declares in the body of it that the plaintiff conveys, "in consideration of £335 to him

in hand paid, the receipt whereof is thereby acknowledged." It contains no words stating that to be the consideration to be paid, nor any words releasing the grantee or the land, and there is no separate receipt endorsed. Whether under these circumstances the plaintiff is absolutely estopped from proving that the consideration was a larger sum, and the excess is not yet paid, is a point on which I have had much difficulty in coming to a conclusion. The case in 2 T. R. 366, and 3 T. R. 474, are clear authorities to shew that for other purposes, and as between other parties, such proof can be received, and that even where a formal receipt has been endorsed and in explicit language. They shew also that the allegations of an additional consideration besides that expressed is held not to be repugnant to the deed. The cases in 2 Taunt. 141, and 1 B. & C. 704, however, are strong authorities to shew that an express release and receipt contained in the deed are binding on the grantor, though certainly in the case in 5 B. & A. 606, the court got over the difficulty by a very forced construction. In Styles 462, the receipt in the deed is not considered to be conclusive evidence of payment, and in 2 P. Wms. 295, proof from a letter of the grantor that the purchase money was not paid was allowed to prevail against the receipt in the deed and the separate receipt endorsed. Upon the authority of these and other cases Mr. *Barton*, a conveyancer of much reputation and experience, comes to the conclusion that the evidence of the deed and receipt endorsed is not conclusive. Mr. *Sugden*, whose opinion receives weight from his present high legal station, clearly comes to the same conclusion. In equity the cases are numerous to show, not only

that the purchase money can be claimed as unpaid in the face of the deed and receipt, but that it forms a lien on the land, and when no separate receipt is endorsed on the deed it is such lien as may be enforced against any purchaser on the ground that the want of a receipt on the back is fair notice that the estate was not paid for. The case in 15 Ves. Junr. 329, is most satisfactory on this point.

It is true that with the exception of the case in *Styles*, these cases are in equity ; but I cannot bring myself to the conclusion that when equity will give a remedy even against a third person, a court of law must, in the face of all evidence, inevitably regard the deed to be an absolute estoppel between the original parties, and allow a purchaser to hold the estate without paying a shilling for it. If the case were one on the strongest ground in favour of a party seeking to take this advantage, such, for instance, when the deed expressly states the same to be in full for the consideration, and contains words releasing the grantee and the land itself from all further demand, and when the usual receipt is endorsed, and if this release were pleaded as an estoppel, I am not sure that in the absence of fraud it would be found possible to sustain an action for any part of the purchase money really unpaid, and indeed few more important questions can be agitated in this province where we have no Court of Equity, and where the practice which obtains in England is much more general of endorsing a receipt where in truth the money had not been paid. In this case there is not the usual separate receipt ; the body of the deed acknowledges the £365 to be paid, but it does not say that

it was the whole consideration, though probably that is the fair inference, yet it does not in modern cases seem to be so considered. Again, the case has gone to the jury on the facts: no estoppel by deed has been pleaded, and the jury, it is said, may in all cases where the estoppel is not pleaded, and is not by matter of record, find the truth notwithstanding such estoppel. This doctrine is laid down in all books on the subject, particularly in Bull N. P. 298, and is recognised in 2 B. & A. 672.—(See Com. Dig. Estoppel C.) The plaintiff does not here claim any part of the £365, which the deed states to have been paid, but he claims a sum beyond that, as part of the consideration not yet paid or acknowledged to be paid. This, nevertheless, is the point on which I have had and still have the greatest doubt; my opinion upon it is in favour of the plaintiff, and as that opinion accords with the justice of the case, I have the less difficulty in inclining to it.

There are other considerations which apply in this case, and which are not immaterial. There has been a part performance to say the least of it; the defendant has received the estate—both the title and the possession—as I understand to be admitted. The weight of authority seems to me to preponderate against that being sufficient in a court of law, and the opinion of the *Lord Chancellor* in 6 Ves. 39, is strong to that effect. There is, however, some weight due to the authority in 1 Br. Ch. Ca. 417, in which it is stated to be the received doctrine in the Court of King's Bench that a part performance would avail there to take a case out of the statute. In 1 Ves. Junr. Mr Justice *Buller* expresses a strong opinion

to the same effect, and the language of Lord *Mansfield*, in 1 Bl. Rep. 600, is remarkable. "The question is singly upon the Statute of Frauds, whether the contract is void by the provisions of that positive law. The object of the legislature in that statute was a wise one, and what the legislature meant is the rule both at law and equity, for in this case both are the same. The key to the construction of the statute is the intent of the legislature, and therefore many cases, though seemingly within the letter, have been let out of it. These instances have indeed occurred in Courts of Equity, not in courts of law, but the rule in both is the same."

The language of the court in 3 Taunt. 169, is similar. I do not however rely in this case on part performance, nor indeed on the entire performance on the part of the vendor, which makes it a sale of lands, and not an agreement for a sale, and seems to reduce the question to recompense for a thing done on the one side and accepted on the other. (See 1 Wils. 117.)

I think it worthy of observation also that the defendant has in fact executed the deed of conveyance as well as the plaintiff by signing and sealing the agreement endorsed on it, which expressly refers to the deed within. This, independently of the bond and other evidence, shows a sale of lands by a writing signed by both parties, and then it remains a question whether an additional consideration can be proved by parol. It has occurred to me also worthy of some attention that in a case on the Statute of Frauds, in Lofft's Rep. 332, much stress is laid upon

the party being in possession of the instrument on which he is charged, although he has not signed it. Lord *Mansfield* says, "I agree that every construction of the statute which would be good in a court of equity would be good in a court of law, for equity cannot relieve against the legislature, and every court of law is bound to construe according to the intent of the legislature." The note was signed by the plaintiff only, but it was in possession of defendant, and in allusion to this Lord *Mansfield* says further, if it were necessary it is out of the statute, because a note signed by one and in possession of the other amounts in this kind of case to the same thing as if the party had signed it. Here the jury have found that defendant accepted the bond signed by the plaintiff. I do not however rest upon the authority of this case, nor am I satisfied that it strictly applies.

The Statute of Frauds, it has been said by a great authority, is to be used as a shield and not as a sword; and Mr Justice *Wilmot*, a very eminent judge, has observed (1 Bl. Rep. 600), "Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than preventing frauds." Against rigorous and unfair applications of the statute courts of law and courts of equity have constantly leaned. Here, unfortunately, we have no court of equity. That circumstance would not justify us in advancing one step beyond the proper jurisdiction of courts of law; but if we should fail in allowing to contracting parties the benefits of every principle which courts of

law do recognise in England, it makes such failure productive of a hardship which there are no means of repairing. The more I have considered and examined the decisions which have taken place in England upon the several points which have been raised I have found less reason to doubt that the law in this case is in accordance with justice, assuming what the jury have found—that such a bond as that described was given by the plaintiff and accepted by the defendant, and considering that such bond was subsequently referred to by the defendant in a paper signed by him. The terms of the contract expressed in writing, definitely, and without ambiguity, are thus recognised by the party to be charged, and the requisition of the Statute of Frauds is substantially complied with. It is said by Lord *Hardwick* in 3 Atk. 503, “The meaning of the Statute of Frauds is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other, and therefore both in this court and the courts of common law, when an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted on.”

We have felt it necessary to look particularly into the proceedings to see whether they are such as to admit of the application of the evidence in a manner that will sustain the issue. Not that the court would in general be desirous of favouring any technical objection that had not been insisted upon in argument; but from the peculiarity of the circumstances the learned judge was induced to reserve the case in terms so general as to make it incumbent

on the court to consider the whole record and evidence minutely. I should therefore feel bound to give way to any legal objection to the plaintiff's recovery if any appeared. Two or three questions have presented themselves upon the pleadings which it is unnecessary now to state, because a full consideration of them has resulted in the opinion that the action is sustained upon the whole record.

SHERWOOD, J.—I think it unnecessary to add anything to the statement of the *Chief Justice* as to the material parts of the evidence adduced at the trial of this cause. I concur in the view which he takes of the Statute of Frauds so far as regards the present case. This action, in my opinion, is sustained on the second count of the declaration, and with respect to the other counts it is not necessary to enter into a particular examination of each of them on the question now before the court. The demurrer is yet to be argued, and I take it for granted the counsel for the defendant is prepared to object to some of the counts.

MACAULAY, J.—I entertained much doubt at the trial whether in this case there was sufficient evidence to go to the jury in proof of the delivery and acceptance of the bond alleged to have been given by plaintiff to defendant, but further consideration has satisfied me that the case was proper for their consideration. It would have been satisfactory had the existence of the obligation in defendant's hands been more fully and explicitly established; yet as the finding of the jury is not sought to be disturbed on the ground of the testimony being slight in itself,

or weighing against the verdict, but to be impugned as unsupported by any legal proof, the court is not called upon to express any opinion upon the result if it be determined that there was evidence in favour of it to be submitted to them.

The instrument which the first witness saw was not produced on notice, and it was competent to the jury not only to bear this in mind, but to weigh his testimony with the other circumstances, especially the unequivocal admission, under defendant's hand, in October, that a bond had been given.—1 Phill. Ev. 423, 343; 2 Taunt. 142; 6 Taunt. 305; 3 Camp. 363; 2 Pothier 187; Doug. 788; 2 B. & P. 542, 8; 5 Taunt. 245.

The letter and proposal of October were properly considered in the first place as affording proof of a bond. The bond being found by the jury, the court must now consider the whole of the documents together as illustrating one transaction. Did the case depend upon the bond alone I should hesitate long before I held that *per se* it contained evidence of an implied promise or agreement on defendant's part to pay the sum and interest mentioned in the condition, at all events, the language being that of the plaintiff only, and not importing mutuality of contract, but a discretionary condition precedent on defendant's part. The bond, however, must be considered with all its concomitant circumstances; and when the proposals in May, the deed in July, with the consideration and description of the property therein, the bond and the proposals, &c., in October, are taken together, they seem to me to explain the

bond, and to establish, by the occasion and nature of the transaction, that the ostensible condition precedent on the face of the condition was in truth the consideration promised on defendant's part upon a reciprocal agreement. It is unimportant to enquire minutely whether the deed in July could estop plaintiff from disputing payment of the consideration. It is not pleaded as an estoppel, and the evidence shews that the money sought in this action forms no part of the sum acknowledged in the deed. The whole subject-matter is laid before the court, from which it appears that a balance of the original price is now claimed, which was postponed till a confirmation should be delivered after a named period—an arrangement consistent with the conveyance of July.—3 B. & P. 181; 2 P. Wms. 292; 1 Camp. N. P. 392, 3; 5 B. & A. 606; 1 E. 624; 1 B. & C. 704; 8 T. R. 379.

A bond and condition may, by recitals or otherwise, contain ample proof of the consideration and agreement on the obligee's part, and such instruments are often received in equity as proof of agreements. In other cases they may be totally silent as to the obligee's promise. Again they may partially shew it, and in combination with other matters fully establish it. The court must receive and construe the contents of conditions like other written evidence. It is clear, too, from a review of the authorities, that although under the bond the plaintiff's became a specialty contract, still, in the absence of any sealed agreement by defendant, the agreement on his part amounts to no more than a simple contract.—2 B. & A. 375; 3 B. & A. 587; 5 B. & C. 602.

The Statute of Frauds being pleaded, I have devoted much attention to that part of the case, and am of opinion that the whole written matter amounts to a sufficient note or memorandum of the agreement within the statute. The proposals in May mention the premises, suggest the probable amount of the immediate advance, and mention a confirmation. The deed includes the same premises; names a consideration not much greater than defendant spoke of, and no receipt is endorsed, and no covenant for further assurance inserted. The conveyance being to operate permanently, sufficiently accounts for the other covenants which it does contain. The bond recites the deed, mentions a sum to be paid with interest, and guarantees a confirmation. The letter and proposal of October refer to the residue of the same premises; the bond, and a confirmation, &c. The last letter is signed by defendant, and refers to the enclosed proposal, with which it might be connected even by parol as well as by internal evidence being referred to, and with which it is connected by the verdict. The proposal is in defendant's handwriting, and contains his initials; it refers to the bond, to a confirmation, to a sum to be paid at a future day, with interest, &c. The bond referred to is ascertained by the jury, and being found, the whole are connected together, either by such finding, or their internal evidence, the last of this train of documents, which by pursuing the references extends to and links the whole, being signed, and the whole amounting to such note or memorandum as the statute requires, it follows that a note or memorandum of the agreement signed by defendant is established.—2 B. & P. 238; 5 Esp. 190; 3 Ves. Jr. 333; 1 Atk. 12; 9 Ves. Jr.

252; 12 Ves. Jr. 471; 3 Taunt. 169; 6 B. & C. 438; 1 Bing. 9, & 196; 7 Moor. 219; 1 Price 64. The last objection is the application of the agreement to the record. I incline to think the consideration is incorrectly stated in the first count, but I conceive the second count sustained. The agreement is therein detailed according to its legal import. I for a time thought the plaintiff should have stated the whole consideration to move from defendant, to entitle him to a confirmation, namely, a request as well as payment, the latter of which only is set out, but as the plaintiff has set out the entire consideration on his part, and the entire act in respect of which he seeks redress, I deem it sufficient. Were defendant suing he would be bound to show a request, but plaintiff might anticipate it, there being no discretion in defendant to forbear indefinitely to make it—2 Burr. 899. And in an action for the money only, after a tender of the confirmation without request, I do not think it incumbent on the plaintiff to notice it in his declaration. Then under this second count several issues are raised; I think all are supported in favour of the plaintiff, unless it be the third, which applies to the Statute of Frauds, and asserts that the agreement was made in writing, signed by the defendant. Now, though I think there was a sufficient memorandum or note thereof within the statute, I am not satisfied this issue is supported, though perhaps it might be properly held to be substantially proved by evidence, either of an actual agreement or of a note or memorandum thereof. However, the fourth issue relating to the same section of the act, and the same act, and the same count and agreement, being found for the plaintiff, it follows that upon the whole re-

cord plaintiff is entitled to judgment on the second count; the event of the third issue therefore is unimportant; a compliance with the statute is established. It is not necessary to advert to the subsequent counts; if it were, I could not say that I think the evidence supports any of them.

I am therefore of opinion, upon the fullest consideration, though not free from doubt, 1st, that there was sufficient evidence to go to the jury to warrant them in finding the sealing, delivery, and acceptance of the bond, &c. 2nd, that all the documents constitute together sufficient evidence of the mutual agreement, and amount to a sufficient note or memorandum thereof within the Statute of Frauds. 3rd, that the evidence sustains the contract as declared upon in the second count. 4th, that the first, second, and fourth issues under that count are sustained in plaintiff's favour, though the third is doubtful. 5th, that upon the whole record the plaintiff is entitled to judgment on the second count for the amount of the verdict.

Per Curiam.—Judgment for plaintiff.

See 5 Ea. 111; 6 Ea. 564; 8 Ea. 7 & 9; 2 B. & B. 359; 4 Taunt. 285; 7 Bing. 574; 6 B. & C. 216.

DOE EX. DEM. HOWARD V. McDONNELL.

A. & B. received patents for adjoining lots. A. inadvertently occupied, fenced, and improved a portion of B.'s lot, according to the mode of running side lines prescribed by the 58 Geo. III. ch. 14. A. had so occupied in the belief that it formed part of his own lot. Some years afterwards B.'s lot was confiscated under the alien act, 54 Geo. III. c. 9, and sold under 58 Geo. III. c. 12. A. and those claiming under him had held the disputed tract upwards of twenty years at the time of action brought, but not twenty years when B. forfeited the estate and the Crown became seized by inquest of office. *Held* that A.'s occupation did not work a disseisin of B., and that B. continued seized so as to entitle the Crown to that portion of his lot in A.'s possession, and that the bargainee of the Crown commissioners could maintain ejectment against defendant, the occupier thereof.

EJECTMENT for twenty-two acres and a half of lot No. 9, 12th concession, Lansdown. The Crown granted lot No. 9 to one Galpin by letters patent: he resided there until the late war, when he deserted this province and withdrew to the United States, The lot was for this cause forfeited to the Crown, under the statute 54 Geo. III. c. 9. An inquisition was returned finding that Galpin was seized of No. 9 before July 1st 1812, and withdrew, &c., as in case of other inquisitions under that statute. The land being sold by commissioners for forfeited estates, under the statute, Flint bought it and sold to Howard, lessor of the plaintiff. The adjacent Lot No. 10 was also granted by letters patent to another person, under whom the defendant derives title. The owner of No. 10 meaning only to occupy what was comprehended within the description of 10, and thinking that he was only occupying 10, inclosed and occupied twenty-two acres, which upon a survey made now, according to the statute 58 Geo. III. c. 14 (which provides that the side lines of all lots shall be run parallel to the actual course of that side line of the township from which the lots are numbered), turns out to be part of 9. The cause was tried at the last assizes for the district of Johnston, *cor Ma-*

caulay, J., and a verdict rendered for the plaintiff. The *Attorney-General* in Michaelmas Term last moved a rule *nisi* for a new trial on the following grounds:

1st.—That the deed from Flint to Howard was merely a quit claim deed containing no words of grant, but words of release only, and that Howard had no previous estate or interest on which such a deed could operate; that the deed does not profess to grant the estate, but merely to release the right and interest of the grantor, which cannot thus be released to a stranger.

2nd.—That Flint being out of possession could not convey to a third person also out of possession, as such a conveyance would be contrary to the statute of maintenance. (This objection, however, was abandoned in Hilary Term last, the facts not appearing to sustain it.)

3rd.—That Galpin, though he had been long in possession of No. 9, before his desertion from the province, had never been in the actual occupation of the specified twenty-two acres, but, on the contrary, these had been visibly and adversely occupied by M'Donnell, the defendant, and those under whom he claimed, for thirty years; that by consequence Galpin never was so seised of these twenty-two acres as that the Crown could be entitled under the 54 Geo. III., ch. 9, and that the Crown or the purchaser of the estate forfeited by Galpin can make title to nothing more than Galpin was actually possessed of, or rather, that the latter cannot make title under the

Crown to these twenty-two acres, which at the time Galpin went away, and long before and since were openly in the occupation of defendant, or those under whom he holds, and not in privity with Galpin, and that the Statute of Limitations has therefore run in favour of defendant.

Bidwell shewed cause.

Judgment was not given till this day.

CHIEF JUSTICE.—So far as respects that part of lot No. 9 of which Howard could be considered as being in actual possession with Flint's consent at the time Flint made the deed in question, there could be no ground for contending that the deed could not operate as a release. As to its operating as a covenant to stand seised to uses, that is of course out of the question for want of a legal consideration to support such a covenant; but that Howard could take under it as a lease, which it purports to be, is clear, because Howard being in by Flint's permission, was tenant at will to Flint, and being so, could take from him a release in fee.—Co. Litt. 270, b.

I am further of opinion that upon the case before us, Howard being in possession of the lot generally, as tenant to Flint, and taking from him a release of the whole, is entitled to be regarded as seised of all that Flint could legally convey, or, in other words, to stand in the place of Flint. Then the question seems to be inevitably brought within a narrow compass by the expressive provision of our pro-

vincial statutes 54 Geo. III., ch. 9, and 58 Geo. III., ch. 12. Under the former statute the inquisition which was returned against Galpin had the effect of vesting lot No. 9 in His Majesty, subject to the right of any person interested in the land to traverse that inquisition within a year. Under the latter statute, particularly the 7th and 12th sections, the commissioners of forfeited estates, and by consequence their vendee, must have acquired, for anything that appears in this case to the contrary, indefeasible and incontrovertible title to No. 9; and I hold that we are not now at liberty to enquire whether by the operation of a disseisin and force of a twenty years' possession, or even by any direct title derived from Galpin, or from the King himself, a better claim to part of lot No. 9 can be made out by any person else. If the défendant in this action, or any other person, had in truth a better title than Galpin had, at the time when the jury found him to be seised, he certainly is precluded from urging it now, and in this manner, or no faith can be placed in the express enactments of the legislature.

What land No. 9 embraced could always have been ascertained and clearly shewn since the passing of the statute 59 Geo. III., ch. 14, and if a title adverse to that of the Crown and contradicting the finding in the inquisition, had been acquired in any part of it, it was incumbent on the claimant under such a title to have advanced it before the purchaser of this forfeited estate became absolutely confirmed under the statute, as I think he now is in all the lands that No. 9 comprehends.

Being of this opinion, as to the effect which must

be given to the statutes respecting forfeited estates, the points which were ably argued upon the operation of the alleged disseisin and of the twenty years' possession by the defendant and those under whom he claims, could not be allowed by us to affect the decision in this case. I have, nevertheless, endeavoured to make up my mind upon them, as upon questions which have doubtless an extensive bearing upon real estates in this province—I mean chiefly in those cases in which boundaries are in dispute—and I will only say here that, as at present advised, I do not think there is anything in those points which would have brought me to a different conclusion if we were at liberty to have decided upon them.

SHERWOOD, J.—(After stating the case)—I am of opinion the facts contained in the inquisition could not be legally disputed except by traversing the inquisition itself, conformably to the 2nd sec. 54 Geo. III., ch. 9, or by making a claim before the commissioners, according to the 7th sec. of 58 Geo. III., ch. 12. It is not alleged in this case that the defendant or any other person traversed the inquisition, or exhibited a claim to any part of No. 9, before the commissioners appointed to decide on claims of that nature, for which reason I think no claim to any part of the premises can now be set up against the King or those claiming under him. The words contained in the 7th sec. of the last-mentioned statute appear to me to be plain and conclusive on this point: “In default thereof” (that is, of making a claim) “every such estate, right, title, interest, use, possession, reversion, remainder, annuity, rent, debt, charge, or incumbrance, into, out of, or upon the

said premises, or any part thereof, shall be and is hereby declared to be null and void to all intents and purposes whatsoever, and the estate or estates as aforesaid liable to and charged therewith shall from thence be freed, acquitted, and discharged of and from the same." By virtue of these two statutes, and the proceedings which were had under them, I think the legal estate in No. 9 was wholly vested in the commissioners, and that they were lawfully possessed of the premises, and held sufficient right and authority to sell and convey them to Flint. It is admitted by both parties, as I understand, that Flint sold the premises to the lessor of the plaintiff, and gave him a bond conditioned to deliver him a deed at a future period, and at the same time gave him possession of the lot so far as he was in possession of it himself as grantor of the commissioners. Afterwards, and while the lessor of the plaintiff was in possession, Flint for a valuable consideration executed a deed to him, by which he "remised, released, and for ever quitted claim" to the lessor of the plaintiff, his heirs and assigns, "all the estate, right, title, and interest" of him the said Flint, to lot No. 9 aforesaid. The deed was duly registered.

The counsel for the defendant objects that the deed from Flint conveyed nothing to the lessor of the plaintiff, because it can only be considered as a release. The lessor of the plaintiff had no estate in the premises upon which the deed is considered as a release, only it had the effect of vesting a legal title in fee simple in the plaintiff's lessor; I think that he was tenant at will, and that his estate was enlarged by his having received a release of the inheritance

by virtue of the deed. If a man enters and enjoys land by the consent of the owner, although there be no express lease, he is tenant at will.—Co. Lit. 56, b.; Ro. Abr. 859; 1 Wils. 176.

The deed might also operate as a bargain and sale, because it is not necessary in such a conveyance to use the precise words “bargain and sell,” for any equivalent words are equally valid.—2 Inst. 672; Cro. Eliz. 166; 1 Vent. 138; 3 Leon. 16. When one man for a valuable consideration in money declares by his deed duly executed that he has quitted claim of all his estate, right, title, and interest of, in, and to certain lands, to another man, and to his heirs and assigns for ever, I think his intention is quite as well understood as if he uses the words “bargain and sell,” and that such a deed is sufficient to convey the estate. C. J. *Willis* said, “the words are not the principal thing in a deed, but the intent and design of the grantor.”—3 Atk. 136. And the same judge said on another occasion, “by the word intent is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular mode or form of conveyance, but an intent at all events that the land shall pass one way or the other.”—2 Wils. 78. In Cowp. 601, Lord *Mansfield* said, “the rules laid down with respect to the construction of deeds are founded in law, reason, and common sense; they shall operate according to the intention of the parties, if by law they may.” I think the whole estate in No. 9 was vested in the Crown by the inquisition, and was subsequently vested in the commissioners by the 58 Geo. III., ch. 12, and that the King in the first instance, and the

commissioners afterwards, were in legal and actual possession of the whole lot by virtue of those acts. In my opinion, therefore, the Statute of Limitations, 21 Jac. 1., ch. 16, gave the defendant no right to possession, because the possession of those under whom he claims, prior to the return of the inquisition, was taken away and ended by that proceeding, and the registry of the extract of it transmitted to the commissioners under the subsequent act 58 Geo. III., ch. 12.

It is therefore unnecessary, in my view of the case, to enquire whether the possession of those under whom the defendant claims title to a part of lot No. 9 was adverse to the possession of Galpin or not, or whether such possession constituted a disseisin before the premises were forfeited to the Crown. I think the defendant acquired no right of possession, since the estate vested in the commissioners, and consequently that plaintiff's lessor is entitled to judgment.

MACAULAY, J.—It was proved in this case that one W. C. had possession of lot No. 10 thirty-two years ago, and that the land in dispute was taken possession of by him as a supposed part of that lot, and as such occupied ever since, being cleared, fenced, and built upon. Lot 9 was occupied about the same period by Galpin, or those who claimed under him. Galpin was seised of lot No. 9 on the 1st July 1812, and having left the province during the last war his estate was confiscated under the alien 54 Geo. III., ch. 9. An inquest of office was taken in 1817, finding lot No. 9 forfeited to the

King. In 1818 the act passed which at present regulates the manner in which side lines are to be run between lots, and at the same time was also passed an act for vesting in commissioners all the forfeited estates for the purpose of being sold. Lot No. 9 became vested in the commissioners according to the provisions of the latter act, and was some years afterwards sold and conveyed, according to the act, to Billa Flint, who sold to the lessor of plaintiff. The occupiers of No. 10 have all along possessed the twenty-two and a-half acres claimed in this action, all parties until of late years supposing it to compose a part of that lot; but under the system of survey established by the boundary act they are found to fall within the limits of No. 9, consequently within a few years disputes have arisen on the subject, so much so, that a tenant of No. 10 under defendant restored the lot: he had possession two years, and then delivered it to another person on defendant's behalf, who had it for one year, and was the tenant in possession at the time of the trial.

It appeared that Flint had not been in actual visible possession of the disputed part, nor in receipt of the profits and rents thereof, within the last three years. When the disputes first arose did not clearly appear, and the survey which determined the tract in question to belong to No. 9 had been made about a year or so before the trial. The affidavit admitted since the trial shows that the lessor of the plaintiff was in possession of No. 9 generally under Flint for two years before the release executed by the latter to him, and that the release was executed in the spring 1830. It is contended, 1st, that under the

facts proved the twenty-two and a-half acres were not vested in the Crown by the inquisition in 1817, and consequently not in the commissioners, or Flint under their deed. 2nd, that the deed from Flint does not contain operative words to transfer the estate.

The provincial statute 54 Geo. III., ch. 9, enacted that all persons therein mentioned who had received grants of land or become seised of land within the province, by inheritance or otherwise, and should withdraw, &c., should be taken to be aliens and incapable of holding lands within the province; that commissions should issue to enquire by inquisition under the hands and seals of twelve jurors, and of the commissioners, of all persons who seised of lands, &c., should have withdrawn, &c., and from and after the finding of such inquisition his Majesty should become seised of the lands so found to have been in the seisin of such person on the 1st July 1812. It was assumed that both lots had been granted by government about thirty-two years ago, and that thereby the grantees respectively became seised, and that they respectively entered into possession accordingly. In 1817, the King, by office found, became seised of the lot in law and in fact, as far as the same was vacant, that is, as far as the freehold was vacant. He, of course, was seised of all except the twenty-two and a-half acres now in dispute, and of them he acquired an equal seisin as forming a part of lot No. 9, if Galpin was in law seised thereof on the 1st July 1812—in other words, if he had not been dis-seised before or upon that day. The authorities do not seem to warrant the inference that the occupa-

tion of the premises in dispute by the owners of No. 10, as proved (being inadvertently embraced as a supposed part of the latter lot, without any view or apprehension of an encroachment upon No. 9), constituted a disseisin. Consequently by the ostensible possession of the owners of lot No. 10, the proprietor of No. 9 was not disseised of the freehold of the twenty-two and a half acres, but continued seised thereof until the 1st July 1812; that, in short, the possession was not adverse, that there was not ouster enough to bar an ejectment after twenty years, unless after the expiration of such a period a jury would be warranted in presuming an ouster, but the title of the King intervening excludes such presumption. The boundary act, and act for selling forfeited lots, were passed the same session. In the absence of claim, the latter seems to have vested absolutely in the commissioners lot No. 9, without exception, of which the twenty-two and a-half acres formed part. I do not think the boundary act is meant to operate upon possessions so as to supersede the Statute of Limitations, but the question always should be, whether the occupier of a tract of land, as composing part of one lot, found by the mode of survey therein prescribed to belong to another, so occupied as a disseisin of the owner of the adjacent lot, or adversely within the Statute of Limitations; if not, then the Statute of Limitations would not run; if otherwise, I should think twenty years' adverse possession would bar an ejectment, whether the period expired previous or subsequent to the boundary act. After twenty years' undisturbed possession the usual legal presumptions would equally operate whatever the origin might have been. The 59 Geo. III., ch. 12,

vesting in the commissioners the actual seisin of the whole of No. 9, they were seised of the freehold estate in the twenty-two and a-half acres, notwithstanding the occupation by the defendant, who did not possess as a disseisor but by mistake. Being seised in law and fact, they sold and conveyed to Flint, who by entering into possession of No. 9 generally, became possessed constructively of the whole and every part. It seems he afterwards sold to the plaintiff, who had entered into possession as much as two years previous to the release, and to whom, while possessed, he released in fee. The possession of the freehold being consistent with the occupation of the owners of No. 10 through mistake, and not as disseisors or adverse holders upon the ouster of the tenants of No. 10, the lessor of the plaintiff was capable of recovering, and Flint was in a capacity to transfer, an absolute estate. As neither Galpin, the King, the commissioners, or Flint were by reason of the inadvertent occupation of the owners of No. 10 deprived of their possession of the freehold, so as to have a right of entry only left, any of them could convey without making entry, only requisite when a disseisin or an ouster of the freehold has been effected.

Had Galpin been disseised, which I was at first disposed to think was the case, the King would not be in possession by office without seisin by his officer or a *scire facias*; but the doctrine of disseisin as laid down in adjudged cases constrains me to hold that Galpin was not disseised, no such intention or object actuating the owner of No. 10 in assuming or continuing the occupation of the premises in dispute.

The possession of the Crown being once established, it appears to me the parties deriving title under the Crown are to be regarded as equally seised for all purposes of transfer, &c.

The fact of Howard's possession previous to the release seems to me to obviate the second objection, for the deed purporting to be a release might well operate upon such possession so as to vest a fee simple estate in him. (*a*)

Per Curiam.—New trial refused

PHELAN V. PHELAN.

A *ca. re.* is not the first and original process in a real action as dower. An infant demandant may sue for dower. If an infant be tenant the parol is not allowed to demur. Costs of motion discretionary.

DOWER.—The demandant issued a *ca. re.* against the tenant, commencing in the common form—"We command you that you take, &c., to answer to (demandant) widow, who was the wife of W. W. P. now deceased, of a plea that he render to her the said (demandant) her reasonable dower which falleth to her of the freehold which was of the said W. W. P. her late husband in the township of Southwold, whereof she has nothing, as she says, and whereof she complains that the said (defendant) deforceth her, and have then there this writ," &c. The affidavit of service states that a copy thereof, on which was endorsed a notice of the intent and meaning of such

(*a*) See *Doe v. Servos*, 5 U. C. Q. B., 285; *Doe v. Rattray*, 7 U. C. Q. B., 321; *Doe v. Gander*, 1 U. C. Q. B., 3; *Doe v. Simpson*, 5 Old Series, 335, 555; *Doe v. Nightingale*, 5 U. C. Q. B., 518.

process, was personally served on defendant, subsequently to which a guardian has been appointed for demandant (an infant), and steps adopted for the appearance of defendant, also an infant, as in a personal action. There is not fifteen days between the *teste* and return of the writ.

The *Attorney-General* moved to set aside this writ for irregularity.

Baldwin shewed cause.

CHIEF JUSTICE.—In one or two actions of dower which have been conducted to a termination in this court, no occasion arose for considering either the legality of the process issued or the regularity of the service, for the tenant appeared and pleaded, and the attention of the court has hitherto been called only to the later stages of the proceedings in dower.

It has now become necessary, for the decision upon this motion, to determine upon the kind of process upon which the action is to be commenced in this court, and in what manner it must be served.

In England the action of dower *unde nihil habet* was commenced originally in the *Curia Regis*, otherwise more commonly called *Aula Regis*, which was the supreme court of judicature established by William the Conqueror, and which before the erection of the Court of Common Pleas exercised an original jurisdiction in all pleas, civil and criminal. The writ issued out of that court, in the name of the King, but with the *teste* of the Grand Justiciar. It was under the seal of the King, and was obtained

from the Chancellor, who was necessarily a member of the *Curia Regis*. It was an original writ of summons, and was returnable into the *Curia Regis*, and issued under the great seal, because the King was properly head of that court, and might and did preside in person, and the Chancellor, who had the custody of the great seal, was a member of that great court, of which his office formed a branch.

Upon the erection of the Court of Common Pleas this action of dower properly belonged to it, for it did not fall within any of those of which the King's Bench took cognisance, either originally and directly, or by the fiction upon which so great a part of the jurisdiction of that court in England rests. The jurisdiction of the Court of Common Pleas, however, in cases of dower *unde nihil habet*, was not and is not original, but upon an original writ issued out of Chancery, and necessarily made returnable into the Court of Common Pleas, according to the provision in Magna Charta.

There can be no doubt that in England such process as in the present instance has been issued and served in a case of dower would be void.—1st, Because it professes to proceed from a court having original jurisdiction, whereas the Common Pleas derives its jurisdiction in dower from a writ out of Chancery. 2nd, Although appearing to be an original writ, it is in form a *capias*, which is not an original writ, but one adapted to enforce obedience to a real or supposed original writ. A *capias* is grounded on a contempt of the original process, and this is not one of those actions in which it is used at

all, the process subsidiary to the original in dower being *grand cape* or *petite cape*—the former when the tenant has in the first instance neglected to appear—the latter when he has made default after his first appearance; but both these are writs against the land, not against the person. 3rd, This writ in England would be void, even though it had been a summons and not a *capias*, on account of its departure from the established form in omitting the direction, “*quod juste et sine dilatione faciat habere*,” &c.

It remains to be considered whether, although irregular and illegal in England, it may not be the proper process here. Upon the remedy for the recovery of dower our provincial statutes are wholly silent. We are therefore left to enquire what there is to affect the question in the constitution of this court, in the law by which it is bound, or in the practice which it has established.

The constitution and jurisdiction of this court rests upon the firmest and broadest basis, and appear clearly in the provincial statute 34 Geo. III., ch. 2, sec. 1, by which act it was created. There is no question of jurisdiction of this court upon questions such as that before us. It has power to adopt the “proceedings of the common bench in actions real, personal, or mixed,” and its jurisdiction is original, therefore no writ under the great seal of the province is required—but the writ is to issue from this court, under its seal, and returnable into this court. Whatever process or proceeding the Court of Common Pleas in England can adopt in a case of dower which

has been brought into that court by original writ out of Chancery, the same process and proceeding this court can adopt without any such original writ, the statute giving jurisdiction in all such cases. So far is clear; and now as the process used in the case in judgment is not the same as that used in England, the question is, what then is in the law of this province, or the practice of the court, to compel or authorise a different description of process.

For the law which governs the right and the principles of the remedy (our own statutes being, as I have said, wholly silent on the subject), we must look entirely to England, according to the third section of our first statute, which provides "that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as the rule for the decision of the same." This legislative adoption of the law of England has no direct application, however, to the form of process in this or other cases. This court has not, under the authority conferred upon it, prescribed any particular form of process or mode of proceeding in the action of dower, and therefore we must carry the enquiry further, and see whether the legislature by any general provision, or this court by any general rule or system of practice, has given occasion and authority for issuing such process as this demandant has sued out. And first, as to the legislature. In the first act already referred to (34 Geo. III., ch. 2) it was provided (sec. 5) that the original and first process of this court should be by writ of *capias ad respondendum*; and in order that the defendant or defendants might be immediately

apprised of the cause of complaint against him or them, the said writ should state the cause of action, and refer to the declaration, which should always be annexed to and served with the writ. And it was further enacted that no process should issue at the suit of any plaintiff, when the defendant is not to be holden to special bail, until the declaration on which it may be founded shall be filed in the office.

By 37 Geo III., ch. 4, the process of this court was placed on a very different footing, and it was provided that in cases which do not require special bail the first and original process of this court should be by writ of summons, to which the declaration was also annexed. This continued to be the form of process in all cases to which in the nature of things it was applicable, until the 2nd Geo. IV., when the legislature repealed these enactments, and provided "that the original process for compelling the appearance of any defendant or defendants in any suit hereafter to be brought in this court shall be a writ of *capias ad respondendum*, tested in the name of the Chief Justice or senior Puisne Judge of the said court for the time being, a copy of which process in actions notailable shall be personally served on the defendant or defendants by the sheriff to whom the process shall be directed, or his lawful deputy or bailiff, being a literate person; and that upon every copy of such process to be served upon any defendant there shall be written a notice to such defendant of the intent and meaning of such service," &c. This, so far as I am aware, is all the legislature have done which can affect this question.

Then as to the acts of this court. No particular

direction has ever been given as to the form of process or proceeding in dower, *unde nihil habet*, or in real actions of any kind. In regard to its practice generally, it has been declared by rule of court, Hilary Term, 1824, "that the practice, where not otherwise provided for, is to be governed by the established practice of the Court of King's Bench in England." And further, with respect to process, that no less than eight days, inclusive, shall intervene between the teste and return of all mesne process to be sued out in any personal action. Upon this provision of the legislature in statute 2nd Geo. IV., ch. 1, and upon these rules, the question turns. There has been no decision of this court within my knowledge upon the process in dower, nor can it be said that there has been a course of practice in dower such as could give a sanction to the form of writ used in this case, or to any other form.

From the premises I have stated I come to the opinion that the process sued out by the demandant is not warranted, and must be set aside. 1st, it has not fifteen days between the teste and return, which it ought to have clearly, upon the authorities in England. This requisition is not, I think, interfered with by the rule of this court which I have quoted above; it is not dispensed with by our statutes; and, on the other hand, the conformity to the English practice in unprovided cases, to which we are bound by the rule, renders it necessary. 2nd, it omits the command to the tenant to render to the demandant; and if (which I am not prepared to admit) it were within the competence of the suitor, as our statute prescribes no form of the *capias*, to devise

one suited to his purpose possessing the essential character of the writ, still he had no power to deviate from the principle of the law, which prescribes that the process shall contain this alternative. Without looking further, therefore, I think this writ must be set aside, and that the demandant may be allowed to sue out a writ according to the form which the court have ordered by rule of this term.—(*Vide post.*)

Upon consideration of the general practice in cases of dower, the court do not find that they can properly lay down any system which shall dispense with the writs of *grand* and *petit cape* used in real actions generally, and which form parts of the proceedings in England in the actions of dower *unde nihil habet*, which is in the nature of a writ of right. The proceeding in England for the purpose of obtaining dower is almost obsolete, and the forms seem so little adapted to the present condition of things in this country that the court would willingly endeavour to devise a system more simple by which the same end might be obtained; but upon mature consideration we apprehend that such an improvement must be left to the care of the legislature. If the single object of the *grand cape* were to bring the tenant into court, we might venture to prescribe for the same purpose a process more in accordance with modern forms, but under the writ by the laws of England the land of the tenant making default may be seized into the King's hands, and in consequence of such seizure the demandant obtains a remedy although the tenant wholly makes default. This is a substantial remedy of which she must not be deprived

by any new regulation of practice ; and it is a right of that nature that we think we must leave it to be acquired and used as the law gives it until the legislature may think fit to devise another course, since we will not attempt to interfere with the freehold of the subject by any process not expressly sanctioned by the common law or by statute.

Since we deem it necessary in the actual state of the law to retain the process by *grand* and *petit cape*, it appears on the whole better to allow the proceeding throughout to preserve the distinctive character of a real action, and therefore, instead of commencing by a *capias*, we have preferred the summons as in England, since it is more in accordance with the principles and object of the action ; it would be rather incongruous to adopt the proceeding by *capias* because it accords with our general practice, when the steps which immediately follow must be different from those taken upon a return of a *capias*. Confusion will best be avoided by not blending these different systems of proceeding.

SHERWOOD, J., concurred as to setting aside the process and service for irregularity. He conceived sufficient cause had been shewn to warrant such a step.

MACAULAY, J.—Upon much consideration I feel bound to hold that the *ca. ad re.* prescribed by our provincial act being only adapted to, was only intended to apply to ordinary personal suits, and not to real actions, which should be regulated by the principles which would have governed the court uni-

versally had no provision been made for the usual process in ordinary cases. I conceive the true construction of the provincial statute to be, that the *ca. re.* is enjoined in all cases where the party may be arrested, or where, after a personal service, an appearance or common bail may by the English practice be entered by the plaintiff for the defendant upon affidavit of such service, but not in suits of a different description. The act is directory and affirmative, not negative and exclusive in its terms.—1 Burr. 447; 7 B. & C. 12. Real actions have fallen into disuse; and it is difficult satisfactorily to trace many points respecting them; but with regard to process generally, the use and object of it should be looked to, and if those ends are secured, it can be of no great moment (unless the court can be held down to prescribed forms) what course is adopted. Though in form a *caption* is commanded, yet in substance and effect the *ca. re.* is but a summons in non bailable cases; so that when no incongruity attended it, a process meant to operate exclusively as a summons might assume the shape of a *capias*, if absolutely imposed by the statute. But when the course of proceeding in dower is looked to, and the reasons duly weighed and considered, I think the inapplicability of a *capias* as the first process is apparent. The English original contains a mandate for the assignment of dower, and a summons to answer in default thereof—yet the one is not bound to tender, nor the other to accept, dower in *pais*, but in court. The mode of service varies, and though it may be personal, still it is not indispensable. The same observation applies to ejectment. I at first thought the form of the *ca. re.* might be preserved with propriety,

and now think that if the court was restricted from proceeding in any suit except by *capias*, the form of such writ might be moulded as effectually to answer the object as a different process in England. But the more I consider the subject, the more I am convinced that the *capias* was not intended to form exclusively the only process, even to the obstruction of the due administration of justice in those cases to which it is not adapted. In real actions, by original and *grand cape*, I think both writs may emanate from and be returnable in this court, which possesses original jurisdiction, and consequently may issue original as well as judicial process: in other words, process either founded upon a previous record or upon the original jurisdiction of the court under the statute. Of course an original out of this court cannot in all respects be considered a King's original writ, but it may answer the same object in suits between subject and subject. The process being similar, the service and subsequent proceedings must of course accord with the practice in England in dower *unde nihil habet*. It follows that the present process wanting, first, the mandatory clause; 2nd, the command to summon the tenant; 3rd, fifteen days between the teste and return—must be set aside for informality.

The mode of service may be also objectionable; although, without expressing any positive opinion, I am disposed to think that a personal service on or off the land will be found sufficient, and that proclamations are only requisite when there has been merely a service on the land not personal, and where there is a church either in the township or

county within the meaning of the statute of Elizabeth. Should any suitor be advised to obtain a return of due summons without actual service, as usual in England, and to proceed at once to the *grand cape*, it will be for the court to decide upon its regularity if excepted to. The *grand cape*, at all events, forms the second step, subsequent to which, I believe, the way to final judgment may be traced in the practical works on the subject.

Per Curiam.—Rule absolute.

Baldwin then prayed that as this was the first instance in the province, and no practice had been hitherto established, that the rule should be made absolute without costs. Parties being also infants.

Sed. per Curiam.—An infant defendant is liable to costs as other defendants, and an infant plaintiff is not exempt. Generally in dower—that is in the action—costs are not taxable, but in all actions and cases, costs, on application to the court, are in the discretion of the court. We think they ought to follow here, because the not allowing fifteen days between the teste and return is a clear irregularity. Our statute law in that respect could not have misled the demandant; and our rule of court adopting the English practice plainly made a longer return necessary. (a)

(a) See Consolidated Statutes, U. C., ch. 28.

PRENTICE V. HAMILTON.

A continuance roll found in the proper office, and entered and filed there by the proper officer, is a record of this court, although not compared with the papers filed in the cause. Parol testimony cannot be received to contradict the roll.

CASE for slander, in saying to the Receiver-General of Province, "He (the plaintiff) has stolen "three hundred dollars from you." The defendant pleaded—1st, The general issue. 2nd, The Statute of Limitations. Issue joined on both pleas. In order to prove the issuing of the first process within two years from the time the slander was spoken, the plaintiff offered in evidence an examined copy of a continuance roll, entitled of Hilary Term, 10th Geo. IV., and filed and entered and docketed by the clerk of the Crown, setting out a writ of *capias*, a recital of an *alias* and *pluries*, and are turn of the sheriff of *non est inv.* on the two first writs. A verdict was taken for the plaintiff, subject to an objection on motion for nonsuit that the continuance roll in the office was no record, and consequently an examined copy of it could not form legal evidence of the facts of issuing the writ of *capias* or its return. The deputy clerk of the Crown proved that the roll of which a copy was produced had been brought to the office of the clerk of the Crown by the attorney for the plaintiff. That it was docketed, numbered, and filed without comparing it with the original papers filed in the office. That writs of *capias*, *alias*, and *pluries* had issued in the cause. That the *capias* had been taken out on the 26th November 1829, and was made returnable the first day of Hilary Term then next. The witness did not know whether the continuance roll corresponded with the original papers filed in the office or not,

and he did not know in what kind of an action the first writ issued. He could not say whether the first writ was taken out in this action or not, although he knew it had been issued, and had been returned into the office. The continuance roll had been docketed by some clerk in the office, and had been filed in the name of the clerk of the Crown, as other rolls had been filed.

To prove the slander the plaintiff called the Receiver-General, who proved that the plaintiff and defendant were clerks in his office at and before the time of the alleged slander stated in the plaintiff's declaration. That to the best of his recollection, in the spring of 1828 the defendant told witness the plaintiff had embezzled £75 of the public money, and, the witness thought, made use of the following words:—"Mr. Prentice has stolen three hundred dollars from you"—meaning that he had feloniously stolen them. The defendant made a similar accusation to the witness before the time to which the witness alluded in his evidence, and repeated it to the witness after that time. To the best of the witness' knowledge, the plaintiff conducted himself with integrity while he was employed as a clerk in the office of the witness. That from defendant's frequently repeating the charge against the plaintiff, without any variation, and from the apparent sincerity with which it was advanced, the witness was impressed with the belief that defendant thought it true; the witness himself did not give credit to the statements of the defendant, but thought the plaintiff might have told the defendant some stories in a jesting way, which had led him into error. The witness, however, did not state that the defendant,

or any other person, alleged that the plaintiff had told the defendant stories of the kind. Previously to the defendant's making the accusation against the plaintiff to the witness, the parties were not on good terms, frequent disputes having occurred between them. On this evidence, which formed the plaintiff's case, the defendant's counsel contended that this was a privileged communication from a clerk to his employer, and that in such a case malice was not to be presumed, but expressly proved.

Sherwood, J., who tried the cause, charged the jury that the words proved imputed the crime of felony, and in the total absence of any circumstances to shew the defendant had reason to believe that money had been stolen at all, and therefore was acting in the discharge of his duty, and for the express purpose of putting their mutual employer on his guard against being defrauded, the law would presume malice. The jury found for the plaintiff.

In Michaelmas Term last the *Solicitor-General* moved to set aside the verdict and grant a new trial.

Baldwin shewed cause.

SHERWOOD, J., this day delivered his opinion.-- (After stating the case and the evidence)—The only objection to the validity of the roll is that it was not compared with the original papers in the office when it was entered and filed; when the examined copy of the roll was obtained, the roll itself was in the custody of the proper officer, and in the office where all the rolls and records of this court should be kept.

When a roll is found in the proper office the law intends that it has been regularly made up, and parole evidence is not admissible to destroy this presumption—1 Bl. Rep. 664. If fraud were alleged and proved it would be different. Although the officer did not compare the continuance roll with the original papers in the office at the time he filed the roll, still he might have previously examined those papers, and might have known that they satisfactorily accorded with the roll; and if the defendant had discovered any material discrepancy between the documents, he should have produced a copy of the writ filed in the office, which of itself is a record. The defendant wishes this court to presume against the regularity of the roll merely from the fact of the officer not having compared it with the original papers when he filed it; but I am inclined to think no such presumption is allowable, and that the parole testimony adduced at the trial in support of it ought not to have been received. I am therefore of opinion that the continuance roll being found in the proper office, and being entered and filed there by the proper officer, is a record of this court.

The next question to be considered is, whether the examined copy of the continuance roll produced in evidence at the trial was sufficient in law to establish the fact of the issuing and return of a writ of *capias* in this cause. When a writ has been returned into the office it becomes a record, and a sworn copy of the record is a good testimony, and is usually given in evidence to prove the fact of issuing the writ.—Bull. N. P. 234; 1 Phill. Ev. 370; 1 Stark. Ev. 285— and the return of a sheriff upon a writ

which has been duly returned and filed is *prima facie* evidence of the acts stated in such return, for full faith ought to be given to the official act of a public officer like a sheriff even when third parties are concerned—11 East. 297.

In order to establish the affirmative of an issue like the second in this case, I believe it is the usual course to produce in evidence a copy of the writ and of the sheriff's returns; but it does not thence follow that no other course is legal, or that you cannot prove the issuing and return of a writ in any other manner. In 2 M. & S. 565, the plaintiffs proved at the trial an examined copy of the record against a third person, containing the judgment, the award of the elegit, and return of the inquisition; and it was objected that a copy of the elegit and of the inquisition should have been produced, but the learned judge overruled the objection, giving the defendant leave to move for a nonsuit if he were wrong. In the succeeding term a motion for that purpose was made, and the counsel in support of it cited Gilb. Ev. 9; Bull. N. P. 104; 2 Saund. 69, C. in notes. The court decided that a copy of the judgment was good evidence, and Lord *Ellenborough* said "the judgment roll imports incontrovertible verity as to all the proceedings it sets forth, and so much so that a party cannot be admitted to plead that the things which it professes to state are not true." There is a later case still more in point in 3 B. & B. 312—trover brought by the plaintiff against the defendant his assignee in consequence of an order of the Vice-Chancellor to try the validity of a commission of bankruptcy issued against the plaintiff. The plaintiff

relied on the Statute of Limitations to shew that there was no legal debt by which the defendant could sustain the commission. At the trial the defendant, in order to show that the debt was not barred by the statute, produced an office copy of a roll in the Court of King's Bench containing entry of a writ of *capias*, *alias*, and *pluries*, and brought down to the term next before the trial, and these proceedings the defendant insisted took the case out of the operation of the statute. It appears that the Court of King's Bench had considered the continuances regularly entered. The counsel for the plaintiff did not object that the roll was not legal evidence, but insisted that, as the proceedings were stated to be in the Court of King's Bench they could not have the effect to take the case out of the statute when the action was brought in the Common Pleas. The court decided the proceedings sufficient to take the case out of the operation of the statute, and the defendant had judgment. In the last case a copy of the continuance roll was admitted to prove the issuing and return of the writs without any objection, and it strikes me the roll was properly admitted to prove a similar fact in the present case, although the issuing and return of the writ of *capias* might have been regularly proved in another way. I am therefore of opinion that the plaintiff should not be nonsuited on the objection taken at the trial.

As to the motion for a new trial for misdirection, I told the jury that I thought the case established by the evidence produced could not properly be considered a privileged case, because the words were clearly slanderous, and in my opinion stood unex-

plained by any collateral evidence indicative of the intention of the party who uttered them. At the trial the counsel for the defendant insisted that the rule of law which applies to a master when giving the character of a servant must always prevail in favour of a servant when making any communication to the master, and consequently that malice will not be presumed against a servant under any circumstances whatever, but must be expressly proved in every instance. In support of this position many cases were cited, all of which I have since examined, together with others on the same subject, but I am not yet convinced of the correctness of the doctrine. When a master gives a character of his servant, whether he is requested to do so or not, malice will not be presumed, but must be expressly proved to sustain an action—1 T. R. 110. The superintending authority of a master and the subordinate situation of a servant necessarily imply a right in the master to express an opinion of the conduct and moral principles of a servant. The interests of society sanction this right, and the policy of the law supports it, but it seems to me no good arguments can be found in favour of a right in the servant to impeach the character of a third person to his master whenever he may feel disposed, without any apparent cause for his assertions. I am inclined to think the communications of a servant to his master stand on the same footing as other communications made from one individual to another in society, and may be confidential, and consequently privileged or not, according to the facts and circumstances which attend them, and the occasion on which they are made. When the words are spoken in the discharge of any duty, the perform-

ance of which is required by the ordinary exigencies of society, although the party was under no absolute and legal obligation to perform it, the occasion operates in the nature of evidence, and supplies a *prima facie* justification. When a person is himself interested in any business or transaction, and in support of such interest makes a confidential communication to a third person *bona fide*, the law does not imply malice, nor does it when such communication is made by a disinterested person to another who is interested in the affair in question, and requests information on the subject. 1 Camp. 267 sustains this principle. The defendant wrote a letter to his bankers charging the plaintiff, a solicitor, with misconduct in the management of their affairs, and it appearing in evidence that the letter was written confidentially, and that the defendant himself was interested in the same concern, Lord *Ellenborough* nonsuited the plaintiff, and his lordship at the same time referred to a case tried on the northern circuit. That was also a case of alleged libel contained in a letter from the defendant to the Bishop of *Durham*, who had employed the plaintiff as a steward on his estates. It was proved that the letter was written confidentially to inform the Bishop of some supposed malpractices on the part of his steward, the plaintiff, and that the defendant had acted *bona fide*, upon which the judge who presided nonsuited the plaintiff. It does not appear by the case what was the nature or extent of the malpractices alluded to in the confidential letter, nor does the case state whether the Bishop had made enquiry of the defendant respecting them, but I rather infer that he did, because the case states that the letter was written on the subject of supposed mal-

practices on the part of the plaintiff. Admitting, however, that no enquiry had been previously made by the Bishop, and that he had no suspicion of any improper conduct on the part of the plaintiff before he received the letter from the defendant, still I think that letter must have contained a particular statement of facts and circumstances sufficient of themselves to create some suspicion of malpractices, otherwise the learned judge who presided at the trial would never have declared himself of opinion, as he did, that the defendant had acted *bona fide*. In 1 C. & P. 279, in a case of slander, when the declaration stated a colloquium between the defendant and one B. H., in which the defendant said of the plaintiff, "he is a rogue and a thief, and has robbed me," and as special damage it was said that B. H., being the under Sheriff of Middlesex, would have nominated the plaintiff a sheriff's officer, but in consequence of these words he refused to do so, whereby the plaintiff lost great gains which would have accrued to him from such nomination. The defendant pleaded, 1st, the general issue; 2nd, a justification, which stated that the plaintiff had been a servant to the defendant, and received certain sums of money for him, and that he had secreted and embezzled the money. It appeared in evidence that the defendant had been a sheriff's officer for many years, and that the plaintiff, who was his follower for several years, had sent an application to the sheriff's office to be appointed a sheriff's officer. B. H., the under Sheriff, saw a person named C., of whom he made enquiries, and afterwards on meeting with the defendant, said to him, "C. tells me that (the plaintiff), who formerly lived with you, is a thief, and has robbed you many times," on which

the defendant replied, "what C. has told you is very true." The under sheriff further stated that he had made these enquiries of the defendant in order to ascertain whether the plaintiff was a fit person to be appointed a sheriff's officer. It was proved by other witnesses that the plaintiff was charged with having kept defendant's moneys, and he said upon being accused, "that he was sorry for it, and must work it out." Under these circumstances, *Best*, C. J., was of opinion that the conversation with the under sheriff was confidential, and entitled to just the same protection as communications relative to the character of servants.

I have looked into the case on which the counsel for the defendant seemed to place great reliance, in Bull, N. P. 8, which appears to be an action of slander brought by a tradesman against the defendant for saying of the plaintiff, "He cannot stand it long, he will be a bankrupt soon;" and the plaintiff laid in his declaration by way of special damage, that by reason of speaking these words a certain person would not trust him for a horse. This person was the only witness called by the plaintiff, and it appeared by his testimony that the defendant spoke the words to him, and in consequence of the communication he did not trust plaintiff with the horse. It further appeared that the words were spoken in friendship and confidence to the witness by way of warning, and not maliciously. C. J. *Pratt* left it to the jury to determine whether the defendant spoke the words out of malice to the plaintiff, or whether he spoke them through friendship to the defendant. This case comes within the class of cases which are

protected by the laws on the ground of friendship, and the communication of the defendant is similar in principle to those which are made in a confidential and friendly manner to a person for his own advantage for the purpose of reclaiming him from some vicious habits, as by writing to his parent or guardian to acquaint him with the fault of his child or ward. In the last case the defendant's remarks were altogether prospective, and alluding to a contingency which he thought was probable, and they were designed for admonitory suggestions to his friend, and for prevention of a loss of his property. The case is reported in a very concise manner, and it does not appear whether the remarks of the defendant were made in answer to enquiries of his friend, or whether they originated altogether with the defendant, but at all events no positive allegation was made, and the entire observations were altogether conjectural. The friend to whom they were made was undoubtedly interested, and he most probably reaped an advantage from the advice. "And if a communication of this sort," to use the words of Lord *Ellenborough*, "which was not meant to go beyond those immediately interested in it, were the subject of an action of damages, it would be impossible for the affairs of mankind to be conducted."

In the case now before the court there is no evidence to shew that the defendant acted in the character of a friend to the Receiver-General, or that the witness was at all interested in the communication which the defendant made to him, because it was not proved that any public money had been embezzled, that any money had been stolen from the witness, or

that the witness had ever entertained a suspicion of such a fact. On the contrary, it was proved he discredited the repeated charges of the defendant, and believed the plaintiff had conducted himself with integrity. It does not appear the defendant was cognizant of any such occurrence of his own knowledge, or from the information of any other person, or that he had the slightest grounds to suspect the plaintiff of stealing or embezzling money. It does not appear that the Receiver-General ever made any enquiries of the defendant respecting the conduct of the plaintiff when he was employed in his office, or that the defendant made any statement to the witness of the time, place, or manner of committing the alleged crime. The defendant merely asserted the existence of the fact unaccompanied by any concomitant or explanatory circumstances. The evidence does not show what time elapsed between the committing of the alleged offence and the period when the defendant communicated the occurrence to the witness.

The evidence therefore which was given at the trial throws no light on the case with regard to the motives and intention of the defendant, but the words themselves, unexplained by any extrinsic evidence, clearly import malice. It appeared, indeed, by the evidence of the Receiver-General, that he was impressed with a belief that the defendant thought the charges which he brought against the plaintiff were true, and the reason given is, that the charges were frequently repeated without any variation, and they were advanced with apparent sincerity. If the defendant did really believe when he made the charges that they were substantially true,

and if he considered that fact material to his defence, it was incumbent on him to disclose the grounds and reasons of his belief to the jury by sufficient testimony to enable them to determine whether his intention was pure and honest or not. If it were once admitted that the mere circumstance of frequently repeating a criminal charge with apparent sincerity were alone sufficient to remove the legal presumption of malice arising from the nature and import of the words themselves, then the question of malice would depend on individual perseverance and manner of speaking, which it must be obvious to anyone might be varied by existing circumstances at the pleasure of the agent, and consequently would form a very unstable basis for the support of any legal principle. Such incidental circumstances may sometimes be admitted as auxiliaries to facts of importance, but it seems to me they never can be properly substituted for such facts, and were insufficient in this case to prove whether the defendant thought the charges true or false.

In my opinion, however, if that fact had been satisfactorily proved by explanatory and indubitable evidence of collateral circumstances connected with the transaction itself, it could not have constituted a valid defence to this action. There appears to be no occasion to warrant the publication of the words; the defendant was not acting in the discharge of any duty which the convenience or exigencies of society required him to perform, and I think if one man of his own accord voluntarily makes use of deliberate expressions which directly impute to an innocent person a felonious offence,

except he do so with a *bona fide* intention and for the purpose of public prosecution, there can be no legal presumption in support of his conduct, even if he honestly thinks the charge is true—3 Esp. 33. The policy of the law originating in the public good, will not allow an action to be brought for any matter disclosed in the common course of criminal prosecutions, but the unfortunate party who has been harassed by a groundless and malicious proceeding must seek a remedy by writ of conspiracy or by a special action on the case—3 Bl. Com. 126; Stra. 691. Had the words stated in the declaration been used in that way they must have been considered innoxious in law as being necessary for the support of public justice, but it does not appear that they were spoken for any such purpose. What has been proved to have been said by the defendant has been likened by his counsel to the ordinary communication of a servant to his master, and the remarks which I have made on that head might seem to imply an admission of analogy without further explanation.

I do not consider the two cases alike. The defendant in this action was a clerk in one of the public offices in this province, and I understand these subordinate officers are uniformly appointed by order of the person administering the government, and consequently are the servants of the public, and it seems to me they are bound to disclose to the government, without unnecessary delay, all felonies committed by other individuals while actually employed in the same department. If such information be made, it should always be accompanied by a par-

ticular statement of all the facts composing the transaction, and of the manner, time, and occasion in which they came to the knowledge of the informer. Such communications possess a sort of public character, and in that respect essentially differ from those which are ordinarily made by servants to their master in private life. I think the words proved in this case are undoubtedly slanderous, because they impute to the plaintiff the crime of felony, and stand unexplained by any extrinsic testimony, in my opinion, to establish a *prima facie* presumption of the absence of malice. Malice in a common acceptation means ill-will against another, but in its legal sense it means a wrong act done intentionally, without any just cause or excuse.—Cro. Jac. 271. As it has not been shown the defendant acted in the discharge of any public or private duty, I think the presumption of law is against him, and that malice must be inferred from the injurious nature of the charge which he made against the plaintiff, and repeated so often at different times, and that proof of express malice under such circumstances is not indispensably necessary to sustain this action.—4 B. & C. 247.

The CHIEF JUSTICE and MACAULAY, J., expressed no opinion.

Rule *nisi* for new trial discharged.

COOPER V. THE CANADA COMPANY.

Process to compel an appearance by the Canada Company cannot be served on the commissioners in this province, as the governor, directors, and the common seal are all in England.

A writ of summons agreeably to the form established by the court in Trinity Term last had been served upon the commissioners of the Canada Company at their office in the province; and last term the *Solicitor-General* moved to set aside the service. *Baldwin contra.*

The court were of opinion that without legislative authority they could not order a distringas upon such a service as the present. The corporation being in another country without the limits of jurisdiction, is like any other corporation of foreign origin and residence, and beyond the reach of the process of this court. That the service was invalid, and should therefore be set aside. (a)

Rule absolute.

FERRIE V. STARKWEATHER.

Where a bill of exchange was endorsed by a firm, one of the partners of which resided out of the province, and the endorser, conformably to the stat. 59 Geo. III., ch. 25, sued the partner residing here, *Held* that the other partner, although released, was not a competent witness to prove the bill not due to the plaintiff.

ASSUMPSIT against the defendant as endorser of a bill of exchange drawn by one Bartlett in favour of a third person or order, who endorsed it to the defendant and his partner, who endorsed it to the plaintiff. The business of the partnership is carried on at Niagara under the firm of Starkweather and

(a) See Consolidated Statutes U. C., ch. 22, sec. 17.

Brown by the defendant. Brown has always resided in the State of New York, and the present action was brought against the defendant alone under the statute 59 Geo. III., ch. 25. The declaration averred Brown's absence from the province. At the trial Brown was called as a witness on the part of the defence, and proved that he endorsed the bill in the name of the firm and delivered it to the plaintiff; and, according to the understanding when he negotiated it, it was to be credited by the plaintiff to the firm as a payment, but plaintiff afterwards objecting to receive it absolutely, the same amount in money was paid by the firm to the plaintiff, and at their request he retained the bill in order to present it to the drawer and endeavour to collect it; and if he had collected it, it was to have been placed to their credit; but the drawer failing to pay it the firm finally paid up all their debt to the plaintiff, and he in fact only held this bill as their agent to collect and account for, and not as their endorsee for value. He was objected to for incompetency, but having a release from defendant discharging him from all liability to costs and contribution in this suit as a partner he was admitted. The jury found for the defendant.

In Michaelmas Term last the *Solicitor-General* moved for a new trial.

The *Attorney-General* shewed cause.

Judgment was given as follows :—

CHIEF JUSTICE.—(After stating the case)—The peculiarity of this case is created by our provincial

statute alluded to; and as the question now raised under it may have an important general application, the point is of sufficient consequence to require a minute statement of the statute. It provides in the first section that in any action to be brought in this province against any joint obligor, contractor, or partner, the action shall not abate for or on account of any joint obligor, contractor, or partner not being made defendant, unless the party pleading such matter in abatement shall shew to the court that such joint obligor, contractor, or partner is living within the jurisdiction of the court, so as to be served with its process conformably to law; 2nd, that the joint obligation, contract, or promise may be given in evidence against any one or more of the obligors, contractors, or partners, and have the same force and effect as to any judgment or execution thereon as if the same was the sole obligation, contract, or promise of the defendant; 3rd, that for satisfaction of any judgment against one or more of several joint obligors, contractors, or partners, no execution shall issue until the bond, obligation, or other written evidence on which judgment shall be had, be first filed with the record of the said judgment.

Upon the general question, when a witness is held incompetent from interest, a few leading principles have been laid down, which in themselves are very clear and reasonable, but when we come to apply them to particular cases we find often a great deal of embarrassment from the very subtle distinctions that have been drawn, and from the apparent and sometimes actual contradiction in the cases. Mr. Justice *Buller*, in discussing the leading principle that

no person interested in the question can be a witness, observed "that there is no rule in more general use, and none that is so little understood."—Bull. N.P. 294. The truth of this remark becomes very obvious upon an examination of the cases, for there is perhaps no other matter in law upon which the opinions of so many and such eminent judges have been held upon deliberate examination to be erroneous.

The legislature intended beyond doubt to afford a convenience and advantage to plaintiffs by the statute of 1821, by allowing a party to sue such partners as are resident in the province, omitting any one or more who are absent. The defendant is disabled from pleading the non-joinder of the absent partner in abatement, because he is absent; but I confess it seems to me that the plaintiff obtains this facility upon no very safe or reasonable terms, if the partner who upon the record is alleged to be absent from the country can make his appearance at the assizes, be received as a witness for his co-partner, and his testimony wholly defeat the plaintiff's action, not merely by shewing that others are liable instead of the defendant, but that the plaintiff has no cause of action at all upon the instrument on which such witness and his co-partner are apparently liable, and upon which his co-partner is sued. I cannot conceive that the legislature could ever have contemplated that such a use could be made of the statute, nor do I think that in law it can be.

In the case 3 T. R. 36, in which, by the way, the *nisi prius* decision of Lord *Loughborough* upon the

competency of a witness, was decided to be erroneous, *Buller, J.*, says the rule is—"Is the witness to gain or lose by the event of the cause?" Trying the case by this standard, I think Brown was not competent. He surely was not indifferent to the event of that cause. If Ferrie had recovered against Starkweather he would have had judgment against him—that is, against Brown's partner for £90 and costs. It is true that by the second section of the statute that judgment and the execution upon it would have had the same effect only as if he had been singly liable. Brown's property in this province, if he had any, would not be liable to the execution; and as to the partnership property, the interest of Starkweather in it is all that could be sold, and the vendee would become owner of a moiety, as tenant in common with Brown, the other partner. But surely the direct consequence of the recovery, in rendering Starkweather so much the poorer, has an unequivocal effect, injurious to the interests of Brown. He remains liable to all the partnership debts; and suppose, while he was in the province upon this very occasion, he and his partner had been served with a process, at the suit of any creditor of the firm, would it make no difference to him that Starkweather's having to pay this verdict and costs, would render him so much less able to pay his proportion of this other debt. Each partner is liable to the whole; what one partner cannot pay, the other must, if he is able; and each has a plain interest in protecting the property of the other against judgments and executions for alleged debts of the firm. Upon this principle the case in *R. & M. 29*, must have been decided. This interest, the release given in

this case does not remove. It only pretends to discharge Brown from all claim of contribution. Against the general effect of a recovery upon the effects of the partnership it could not indemnify him. See the case in 4 Camp. 27. Upon the same principle that this witness would be admitted, suppose one partner of a firm were generally believed to have died abroad, and a plaintiff proceeds against his partner resident in England,—if the partner supposed to be dead should return before the trial, then he would be a competent witness against the plaintiff, upon the very merits of the cause.

The case in 3 T. R. 27, is a very leading case now, and all that is there said tends strongly, in my judgment, to shew Brown to be an inadmissible witness. Bowden, the witness there, was liable as an underwriter upon the same policy; he was not a joint insurer, nor liable to be sued in the same action with Baker. He was released from all obligation to contribute to the costs of the action against them, and yet the court, in deciding that he was competent, felt that they were much pressed by the weight of opposite authority, and all the judges laid great stress upon the peculiarity of the case, which imposed a necessity for the admission of his testimony, on account of his agency as broker, in effecting this insurance with others before he became a party to the policy as underwriter. But in this case, as well as in all others, the effect of a direct interest or advantage from the event of the suit, is held clearly to disqualify. A very remote or barely possible interest will not; but if the interest is positive, and directly consequential upon the event of the suit, it is not the

amount of that interest which the law regards. It is the principle then which excludes. It is true that here the question could only effect the interest of Brown's partner to the extent of only about £100, but the same reasoning that would admit him in this case would admit him in any other; and suppose the action were between the foreign correspondents of the firm and Starkweather, involving many thousands of pounds, and the whole course perhaps of a very extensive dealing, could it be possible that Brown would be allowed to give evidence of his own conduct and intentions, and to place his own colouring and construction upon transactions in which he was as deeply interested as Starkweather, and in which he was acting on his own account with a direct view to his own interest. If it can be regarded as a matter of no interest or advantage to him that his partner should escape a liability to a debt of £5 or £10,000, then it must follow that it is of no consequence to a man whether his partner be in affluent circumstances or insolvent.

It has often happened in England that one of several partners has not been included in an action, and if not pleaded in abatement, the plaintiff may recover against the partners sued, as he may here, under the statute; but I can meet with no case in which the partner so omitted has been received as a witness for the defendant upon the merits of the action. It was indeed ruled in 1 Esp. case 20, "That when the plaintiff had chosen to proceed against the defendant solely, he should not be allowed at the trial, by suggesting merely the existence of a partnership between the defendant and the witness, to

deprive the defendant of his testimony, particularly when the effect of her testimony was to make herself liable." But it is not a bare suggestion in this case; this witness swears himself to be a partner of the defendant, and his whole testimony is formed on his power as a partner. It is by evidence of his own acts and agreements as a partner, sworn to by himself, that he comes to defeat the plaintiff's cause of action; and instead of his testimony tending to make himself liable, it tends to remove all liability from his partner and himself. I understand it to be endeavoured to maintain Brown's testimony simply upon these two propositions—that the record in this action could neither injure nor avail him in any action that could be sustained against himself by the present plaintiff; and secondly, that his interest so far as depends upon liability to contribute to his partner is removed by the release. But upon these principles, any dormant partner of whose interest a plaintiff may be utterly ignorant may be produced as a witness for his co-partners, upon the very merits of the action. I find no precedent for such a thing; and it is evident to what abuses it would lead, for defendants in important cases would be careful not to plead non-joinder in abatement in order to avail themselves of the evidence of their co-partner, if such a release as this could qualify them. The admitting a co-partner to give evidence for the mere purpose of proving who was the proper person to be charged, as in 1 Esp. c. 103, rests on different grounds. I can nowhere discover that a partner, while he continues such, can be a witness for his co-partner upon the very merits of the point in litigation, and the doubts that were so gravely discussed

in *Bent v. Baker*, with respect to the underwriter, who was not a partner, convinced me that he cannot be. If Brown had remained in the province, and Starkweather being sued alone, instead of pleading in abatement, had chosen to defend himself by contending that the endorsement was forged, I think he certainly could not call Brown, his partner, to prove it; and yet the verdict in that action would neither more or less affect Brown than the verdict in the present case, and he might be released from contribution as he has been here. I can see no difference in principle between the effect of his evidence in proving the endorsement to be fictitious, or in proving that it was given under circumstances that excluded the responsibility which it *prima facie* imported.

In the case of *Burton v. Burchall*, cited in Mr *Peak's* digest of cases on the interest of witnesses, it was determined, "that if two persons jointly contract, and after the death of one an action is brought against the survivor, the next of kin of a contractor may be called as a witness for the plaintiff, to prove the joint contract, for the same evidence which fixes the debt in the survivor creates a charge against himself for a moiety," and it is added (note) "In this case there was no other witness." I cannot but conclude from this case, that upon general principles neither the representative nor next of kin of the deceased joint contractor would have been admitted to disprove the contract altogether, though perhaps the release might have qualified. In the case in one T. R. 30, what is said by Mr Justice *Buller* is strongly in point.

Independently, however, of the main objection, the particular nature of the evidence which Brown is called upon to give shews him, I think, to be clearly incompetent, upon the authority of 5 T. R. 578. There the endorser of a bill in an action by the endorsee against acceptor, was called by the acceptor to prove, as in this case, that he had merely transferred it to the plaintiff, in order to enable him to get payment from the acceptor, and not to convey any interest to him. He had a release from the defendant. Lord *Kenyon* rejected him as an interested witness, and the plaintiff recovered a verdict which was afterwards supported in argument in bank. Lord *Kenyon* says, "The whole question turns on this, whether the witness' situation would or would not be altered by the event of the verdict in this case. I am still of opinion that it would, for if the plaintiff should succeed, Gregson would be put to much greater difficulties to get back the money, than if the plaintiff should be foiled by means of his testimony." This was after the case of *Bent v. Baker*, and I do not see that the authority is shaken by the case 2 Ea. 458, when the court noticing this case decided differently, but under different circumstances.

Certainly Brown, the witness here, comes to defeat the action, by proving that notwithstanding the endorsement there is still a right of action and a property in this bill, in his partner and himself; and if on his testimony the plaintiff fails, what is to hinder an action by himself and his partner against the drawer, for the amount; and if his partner could alone recover this partnership debt, still his interest

would be equal, since it would clearly belong to the partnership fund. This case is infinitely stronger than that in 5 T. R., because in that there was no privity between the witness and the other party in the action, and if the plaintiff had then succeeded doubtless the witness could legally recover against him as for money had and received for his own use. The court held him incompetent, because he might find difficulty in this recovery, and on this ground it is that this decision has ever been doubted; but here if the plaintiff had recovered against the defendant the note was lost to the partnership. Brown alone could not have sued Ferrie for money had and received, because his interest was joint with Starkweather, and Starkweather could not join in suing him because he would be barred by the recovery in this action.

As to the other point, that without this witness there was sufficient evidence to show that plaintiff should not recover, I will only say that it ought, I think, to be left to a jury to say whether they are of that opinion, for certainly the most direct and important evidence received by the court was that which we now think should have been withheld from them.

SHERWOOD, J.—The declaration in this cause specially refers to the statute just mentioned, and charges the defendant as a sole contractor, and it struck me on perusing the act that the bringing of this action against one of the joint contractors while the other resided in a foreign country had the effect to render the contract several and to destroy its

joint character altogether. If that were the case I should still be of opinion that the witness was competent, because he would under such circumstances be liable to be sued himself for the amount of the bill by the plaintiff, whether he succeeded in recovering a verdict against the defendant in this case or not, and consequently, as the witness would be liable to the plaintiff in either contingency, he would stand indifferent between the parties. When the contract is several, the recovery of a judgment without actual satisfaction against one contractor is no bar to an action against the other. — Yel. 67; 6 Co. 45; a. 2 Cro. 74. When a witness is reduced to a state of neutrality by an equipoise of interest the objection to his testimony ceases. — 2 T. R. 267; 7 T. R. 480; 2 Ea. 458.

It was urged by the counsel for plaintiff that a partner not sued could never be a witness under any circumstances for his co-partner who is sued, because the whole of the partnership property would be immediately liable to be sold for the satisfaction of a judgment recovered against any one of the firm, and therefore the witness would be directly interested in the event of the suit. This objection, I think, is not tenable, for it appears to me the law is clearly the other way as relates to the joint property of the firm. Upon an execution against one partner on a judgment recovered against him alone, his interest only in the partnership estate can be sold, and the vendee of the sheriff would be tenant in common with the other partner, and hold precisely the same interest which the partner whose share is sold was entitled to, and subject to all the claims existing

against him—4 Ves. 396 ; 15 Ves. 557. The vendee of the sheriff would have only the surplus of the partner's share, after payment of all just debts to strangers and to the other partners, and therefore he might ultimately receive nothing.

A court of law has no jurisdiction over questions of this kind, they are exclusively settled in courts of equity, whose principles of decision are generally as well defined as legal decisions. I am not therefore of opinion that one partner not sued can never be a witness for his co-partner in a separate action brought on the joint contract. I think a case might happen in which he would be a good witness like any other joint contractor not sued, and who has a release. I have changed the opinion, however, which I formed at the trial of this cause. A further consideration of the 59 Geo. III., ch. 25, has convinced me that the act has not the effect to make the joint contract of the two partners a several contract, as I once thought, but merely to make the remedy a separate one as regards the partner resident within the province. It appears to me now that the suing of one joint contractor under the provincial statute, has the like effect only as the proceeding in England against one joint contractor after the outlawry of the other. In such a case, if the joint contractor who is sued happens to die before final judgment, the creditor must proceed against the survivor, though he be outlawed, and he cannot continue his action by *sci. fa.* against the personal representative.—1 M. & S. 242.

In this view of the law, the present contract remains joint, as it was first made, and consequently

if the defendant succeed in recovering a verdict against the plaintiff on the merits, or in other words, for the reason which he alleges in his defence—"that the bill was endorsed by the defendant and his partner to enable the plaintiff to collect the money for them as their agent, but not for the purpose of transferring the property in the bill to the plaintiff"—then Brown, the witness, could not be sued in a separate action, as he could be if the contract was several, but he and his partner, the defendant, might bring an action against the first endorser or the drawer, for the amount of the bill, because the property remains in them if the plaintiff acted only as their agent and did not purchase the bill.

Considering the contract therefore as remaining joint, notwithstanding the action is brought against one of the joint contractors alone, under the provisions of the statute before mentioned, I think Brown was not a competent witness, and that the plaintiff should have a new trial.

MACAULAY, J.—It is averred on the record that Brown was a joint partner and out of the province. No plea in abatement is offered, and under our statute I should think, in sound construction, if the fact of absence is not disputed, the proceeding, when the joint contract appears of record, should be treated as analagous to outlawry in England, where the party outlawed is not a witness.—Hardw. 123, 264; Peake Ev. 169-70; 1 M. & S. 242. If otherwise, then, though the cases are not uniform, I think, upon general principles of policy and justice, a

general partner, defendant, declining to plead in abatement, cannot, because released, be made a witness for his co-partner. His interest is identical with the defendant's generally, and cannot be superseded by a release in the particular case.—1 R. & M. 29; M. & M. 430, 2 Bing. 133; Stark. Ev. 1084. If the partnership effects are not liable for the individual debt of a co-partner until the co-partnership accounts are first settled and deducted, and if it was not pretended that this was (if a debt at all) not a partnership but an individual sole debt of defendant, had not Brown an interest, notwithstanding the release, the partnership property being liable, although he had claims as a partner?

Clearly he would also be incompetent on another ground, for if plaintiff failed on the ground of being merely the agent of defendant and Brown, though ostensibly a *bona fide* endorsee, then Brown and defendant could sue the drawer for the amount of the bill. This is a direct interest not affected by any release.—5 T. R. 578; 1 Esp. 85.

Per Curiam.—Rule for new trial absolute. (a)

CORNELL v. QUICK.

A writ of replevin with a *justicies* clause is irregular. An original writ *alias* and *pluries*, modified in form so as to conform to the local jurisdiction, should be adopted.

A writ of replevin was sued out of this court and put in the hands of the sheriff in the following form:—

“William the Fourth, &c., &c. To the sheriff, &c. We command you, that justly, &c., you cause

(a) See the Evidence Act, Consolidated Statutes U. C., ch. 32.

to be replevied to W. Quick his goods, &c., which William Cornell took and unjustly detains, as it is said, and afterwards cause him to be justly remedied in this behalf, that we may no longer hear any clamour thereupon for want of justice." Tested in the name of the Chief Justice.

And in last term a motion was made to set this writ aside as not founded on any recognised practice of this court. The question being new, the court took time to consider, and this day gave judgment as follows :

CHIEF JUSTICE.—The difficulty is so great in accommodating the English process of replevin to the circumstances of this country that the court must feel every inclination to facilitate suitors in the attempt rather than to throw any unnecessary obstacle in the way. But with every desire to assist the plaintiff's proceeding, it is impossible that the process which has been taken out in this case can in any view of it be supported.

The writ before us is nothing else than the writ of replevin, which by the common law of England issues out of Chancery, directed to the sheriff. It is a *vicontiel* writ, and is usually termed a *justicies*. The object of it is to command the sheriff to cause replevin to be made, and to hear the cause, and do justice to the parties. The writ commits the cause wholly to him, and though under a subsequent proceeding, it may be, and usually is, transferred to the King's Bench or Common Pleas by a writ returnable into that court, still the office of this writ is to place the

matter wholly under the cognizance of the sheriff in the first instance. It is therefore not returnable into the superior court, and indeed has no return whatever, nor has the sheriff or either of the parties under it any day in the superior court.

Following the form under circumstances wholly different, this writ in like manner commands the sheriff to replevy and to remedy the complainant, but we cannot give the complainant a remedy here, for our sheriffs have no court in which the proceeding can be conducted. The command therefore is nugatory, so far as respects the ulterior proceedings in the cause, and upon such a writ as this all must drop. Neither under this writ, which is by the common law, nor upon the plaint of the party under the statute of Marlebridge, can any proceedings take place which will end in placing the case within our cognizance. In England, when the action of replevin is depending in the inferior court, it comes into the superior court upon the *pone* in the former case, and upon a *recordari facias* in the latter. A writ out of this court having no day of return, nor commanding anything to be done or certified, and giving no day to anyone to appear, is an anomaly that has nothing to support it in our own or the English practice; it can tend to nothing and must end in nothing. In England the writ of replevin and an alias and pluries are usually all issued together from Chancery to the sheriff, the two former have not returns it is true, because on the principle of the proceeding it is contemplated that the sheriff will do as he can do complete and final justice in the matter, and therefore neither the first writ nor the *alias* are made re-

turnable into a superior court, because so far the superior court have nothing to do in the case. From their having no return the complainant is enabled without any repugnancy in practice to take them out together, and indeed he takes also a *pluries* at the same moment, and as the *pluries* is supposed by a fiction to be rendered necessary by the neglect of the sheriff to act upon the two preceding writs, that writ which like the others issues from Chancery is made returnable into the King's Bench or Common Pleas, and it contains a clause of "*vel causam significes*" commanding the sheriff to do as in the others, or to show why he has not done it, and it gives a day to the sheriff in the superior court for that purpose. If the sheriff replevies he need not return this writ, but the cause may go on in his county court, but if from any cause he cannot replevy he returns his excuse, and if that excuse be that the cattle or other chattels have been eloigned by the defendant, then a *capias in withernam* issues, which, besides a specific direction to take the defendant's own goods and keep them until he shall allow the distress to be replevied, commands him to attach the defendant to answer for the contempt in the court above.

All these proceedings are clearly explained in many books, and it is unnecessary to trace the remedy further in order to determine that the plaintiff here is not in the right track. It is an important general question to ask what he might or should have done? I do not at present pretend to determine that it is in the power of the party to adopt, upon sufficiently clear authority any line of proceeding that shall place his cause of action under the

cognizance of this court, or that this court can, without the aid of the legislature, remove all obstacles to a convenient remedy. An original writ from this court containing in the first instance a command to the sheriff, as the *pluries* writ of replevin in England, and given him a return as in other process of this court, appears to me at present to be the most proper and consistent course.

SHERWOOD, J., concurred in setting aside this writ.

MACAULAY, J.—The mode of proceeding in this action at common law was by issuing an original writ called a justiciary writ, directed to the sheriff, by which he was authorised to deliver the goods and to determine the matter in the county court.—Roscoe 623. This is long obsolete, and the usual way has been to levy a plaint on the county court, which plaint ought regularly to be levied before the goods are replevied (3 Price, 18), but which may be entered at the court next after granting the precept to replevy (2 Inst. 139, Co. Lit. 145, b), the sheriff being authorised by the statute of Marlebridge (52 Hen. III., c. 21) to deliver the goods and to hold plea in replevin of any value, as he might at common law on a writ of replevin, and upon which it is said he might verbally command his bailiff to replevy the goods.—Gibb. 192. Replevin by original writ is said to be still frequent in Ireland.

The county courts originally had jurisdiction of civil and criminal offences generally. After the conquest their power was abridged, and they fell from

their pristine splendour and dignity. The Sovereign Eyre or Supreme Court, which at first possessed an appellate, acquired ultimately an original jurisdiction, and upon the establishment of the *Aula Regis* the influence of the county courts was still farther lessened, by the Conqueror ordaining that all causes of action of 40s. and upwards should be determined by the King's writ, at first usually returnable into the *Aula Regis*, at other times returnable into the county courts, when they were called vicontial writs. When afterwards the powers of the *Aula Regis* were distributed amongst various tribunals, the King's Bench, which name the remnant appear to have assumed, retained amongst other things its jurisdiction in replevin.

In the peculiar case of replevin, the restricted jurisdiction of the county court was obviated, and the suit might be instituted there by plaint or by original returnable into that court; from thence the proceedings might be removed into the King's Bench or Common Pleas, in the former case by *re. fa. lo.*, in the latter by *pone*, both original writs issuing out of Chancery, and being returnable in one of the superior courts of law. As we have never had county courts in this province, the practice by plaint could not be pursued, but I conceive this court may issue an original writ in replevin, which should so far differ from the form and substance of that used in England, that the sheriff should not be clothed with any justicial power, but should be required to replevy the goods and cite the defendant to appear in this court, as in England is observed with respect to the county court. I see no objection to a day being

given to the defendant, and when the writ is returned I should think this court would have possession of the case precisely as the King's Bench or Common Pleas have upon the return of a *pluries* original, or of a *pone*, and that ulterior proceedings should correspond with theirs. An attention to the nature of the proceedings by original in England will illustrate my meaning. The law and practice of replevin is well digested and laid down in Gilbert on Distresses; Fitz. N. B. 68; 2 Sellon's Practice; Roscoe on Real Actions; Impey's Sheriff; Selwyn N. P.; Hammond N. P., and other works and cases to which they refer. The original writ is said to be vicontial, being returnable into the county court, and justicial from the words in the writ, "*et eum juste deduci facias*," which gave the sheriff power to proceed judicially in the matter in this court. Various objections existed to this course of common law. 1st, being by writ, the application was required to be to Chancery, which was tedious and dilatory. To remedy this the statute of Marlebridge was passed, giving the sheriff an immediate jurisdiction by plaint. 2nd, If the plaintiff in replevin pleaded to the lord's avowry that the tenant was heir, then the inferior court had no further cognizance, because this plea brought the freehold in question. This was remedied by Westminster 2, c. 2, which gave the lord a *pone* to remove the cause out of the county court into the king's courts, a step now usually taken in all cases either by *pone* or *re. fa. lo.*, according to the nature of the incipient proceedings. 3rd, That a judgment was often nugatory, the defendant having sold the cattle and become insolvent, and the sheriff being unable to exact any securities except from the plaintiff *plegiū de prose-*

quando, in this as in other cases a mere matter of form. This was remedied by Westminster 2, c. 2, requiring pledges *de returno habendo*. 4th, That after nonsuit the avowant could not have a return irrepleviable, but the tenant might replevy *ad infinitum*. This was also remedied by the last mentioned statute. The establishment of district offices with us obviates the first objection. The second does not apply to this court, and the third and fourth are susceptible of the redress afforded by the statute of Westminster here as well as in England.

The writ sued out in this cause follows strictly the English original writ, and in its terms professes to confer upon the sheriff justicial power. I think a writ in the following form might be adopted:—
“William the Fourth, &c. To the sheriff, &c. We command you that you justly cause to be replevied to A. B. his goods, &c., which C. D. took and unjustly detains, as it is said, and afterwards take the said C. D. if he shall be found in your district, and him safely keep so that you may have his body (as in common writs of *ca. re.*) on the — day of — (the return day) to answer to the aforesaid A. B. hereof, or signify to us the cause why you would not or could not execute this our command, and have then there this writ. Witness,” &c.

A copy of such a writ should be served, as in other cases, with a notice endorsed of the intent and meaning thereof. My reasons for approving of this course are threefold. 1st, In England upon the original (justicial) writ the sheriff makes out a precept to deliver the beasts and attach the defendant

to appear at the next court day. So when the proceedings is by plaint the precept is made to the bailiff to deliver the beasts and attach the defendant. The reason assigned is that replevin is in the nature of a trespass for a tortious act, when an attachment is the first process, which means the attachment of the goods not the body.

2nd. When the original has been executed so that the county court is in possession of the suit, a *pone* issues for its removal into a superior court. This writ commands the sheriff to put before the King's justice at Westminster on (the return day) the plaint before him, and to summon by good summoners the defendant that he be then there to answer the aforesaid plaintiff thereof, &c. The reason of defendant being summoned in this writ is, that being already attached in the court below, and having appeared, it is presumed he would come in upon the summons; but as far as the original with us might be substituted for the other process used in England, I would use the word take instead of summons, in literal compliance with the provincial statute, as it may be done without incongruity, and serve it with notice in substantial compliance with the law.

3rd. Further, it is laid down that if the sheriff do nothing upon the original writ an *alias* may issue, and then a *pluries* returnable in the King's Bench or Common Pleas, and it is said in Chancery, for reasons given in Gilb. 106. In the *pluries* must always be inserted the clause "*vel nobis causam significes*,"—"or signify to us the cause why you

would not or could not execute our commands heretofore directed to you," which may be included in the *alias*. These writs give no day to the defendant but to the sheriff to account for his default; yet, though there is neither summons nor attachment in the *pluries*, the return of it is a good day in court to the parties. There is an attachment too in consequence of law, the defendant being obliged to appear upon the peril of a *withernam*,—Lord *Raymond* 617. The *alias* and *pluries* may be sued out without the original, or all may be obtained together. It is said by C. B. *Gilbert*, 107, but questioned in *Hammond's N. P.* 407, who refers to the year books, that the *pluries* supersedes the proceedings of the sheriff in his county court, and that the proceedings are upon the writ and not upon the plaint, as they are when the plea is removed by *recordari*. That the *alias* also supersedes his power when it contains the clause of "*vel causam nobis*," &c. If the plaintiff comes into court, *et obtulit se*, on the day on which the sheriff by *alias* or *pluries* is to show cause, he shall have an attachment against the defendant to bring him in to answer, and this writ gives them both a day in court. The reason, as mentioned before, is that replevin is in the nature of a trespass, and in trespass attachment is the first process, and as well in the county court as in the court above the plaintiff may have attachment in the first process, and if the defendant fail to appear then a *capias* on the statute 25 Edw. III., ch. 17. As far, therefore, as the first process here may be assimilated to the *pluries* attachment or *capias* mentioned, combining as it may the effect of any or all of them, I perceive no inconsistency. It seems, too, that by delivering

the *alias* and *pluries* to the sheriff in the first instance, omitting the original, the plaintiff may at once take the cause out of the sheriff's court, so that if in deference to form the English practice should be required to be more rigidly adhered to, the plaintiff might sue forth from this court an original *alias* and *pluries*, similar to those obtained in Chancery, and secure the return to and appearance in the King's Bench, by delivering only the *alias* and *pluries*, and then issue an attachment and *capias*, but since all result in the *capias*, at last, which is doubtless the efficient process to enforce appearance, much unnecessary delay and expense are saved and obsolete fictions are dispensed with by resorting at once to a process under sanction of our provincial act, equivalent to the whole, or at any rate best calculated to afford redress with justice and despatch.

In failure of a due return an attachment may be had against the sheriff in England, and equally here. Of course an *alias* and *pluries* may issue in failure of the first, and when so the clause "*vel causam significes*" should be inserted. Previous to executing the writ of replevin the sheriff should of course take pledges *de returno habendo*, &c., according to Westminster, 13 Edw. I., ch. 2, sec. 3, for the sufficiency of which he is answerable, 2 Bl. Rep. 1220. And in cases of distress of rent the provisions of the statute 11 Geo. II., ch. 19, sec. 23, on this head require special attention.

It is not necessary at present to give any opinion as to the ulterior proceedings. If defendant fail to appear, in England, the *capias* is followed by process

of outlawry; perhaps a like course may be opened here; if not, the court I should suppose would protect the plaintiff, so that upon the return of the *ca. ad. re.* by appearing for the defendant under the provincial statute or otherwise, the plaintiff would be enabled to go on as effectually as in England. The non-appearance is in the defendant's delay, and the plaintiff has the goods, but diligence on his part is requisite to preserve his bonds and preserve the benefit of his replevin. A day being given in the court, the practice on that head in the courts at home when a day is given does not apply, and the plaintiff may be non-suited or non-pressed as in other actions. I see no objection to the writ of *withernam*, founded upon the *elongata* returned by the sheriff, and perhaps upon a return of *nihil a capias* may follow. Nor do I see any objection to the writ *de proprietate probanda*, if necessary.

After the parties are both in court I am not aware that any difficulty presents itself in the further stages more than in England. The proceedings throughout are complex, and the strictest attention is required to avoid irregularities; but with that attention I apprehend that practitioners will be able to trace their way to judgment whatever shape the pleadings may assume.

Per Curiam.—Rule absolute to set writ aside. (a)

(a) See the Replevin Act, Consolidated Statutes U. C., ch. 29.

WILLIAMS v. KING, ONE, &C.

In an action for money had and received against an attorney, he cannot set up as an answer to his client that the judgment under which the money was collected was fraudulently confessed by the defendant in that cause to the client.

ASSUMPSIT for money had and received against the defendant, an attorney of this court. The facts were that one Pindar confessed a judgment to the present plaintiff, under circumstances which raised a strong presumption of fraud. The present defendant acted as attorney for the plaintiff, entered up judgment and issued an execution, under which the sheriff levied about £200, which the attorney received. Afterwards different creditors of Pindar put in their claims and applied to the court for an order to pay the money into court, to be paid over to the creditors, on the ground that the judgment entered up was fraudulent and without consideration. This application was refused. The defendant then refused to pay over the money to his client, and this action was brought to recover it. At the trial *coram* the Chief Justice, the defendant gave in evidence all the facts shewing that the judgment was fraudulent, and the jury were charged to take that evidence into consideration, in order that they might find whether there was a fraud or not. The jury found for the defendant. And in Easter Term last *Draper* moved to set aside this verdict, on the ground that the evidence was improperly admitted, and that at *nisi prius* no considerations but the legal rights of the parties could be entertained.

It was argued in the term following by *Draper* for the plaintiff, and the *Solicitor-General* for the defendant. Judgment was deferred till to-day.

The CHIEF JUSTICE said, that on consideration the court were unanimously of opinion that the verdict could not be supported, as it was not competent to the defendant to set up this defence against his own client.

They therefore granted a new trial without costs, but intimated strongly that the fraudulent conduct of the plaintiff and Pindar with regard to the confession might form the ground of an application to the court itself to set aside the judgment in favour of the creditors, when the rights of all parties could be investigated and the question fully argued and properly determined.—See 8 B. & C. 211; 1 Ves. Junr. 161.

Rule absolute.

THE KING V. ABNER IVES.

On putting off the trial of an information for penalties at the instance of the defendant, the court will make payment of costs a condition in the same way as in civil cases.

This was an information for penalties under the imperial statute 6 Geo. IV., c. 114.

The defendant, at the Midland District assizes, moved to put off the trial, upon affidavit of the absence of a material witness, and a question was reserved for the opinion of the court, whether the court could, and if they could whether they ought to make the payment of the costs of the day a condition of granting the indulgence, and the court took time to consider the question till to-day.

CHIEF JUSTICE.—I am of opinion that in this case the defendant may be properly made to pay the costs of the day for being allowed to put off the trial for the absence of a material witness. It is true, as a general rule, that the King neither receives nor pays costs, and therefore the doubt is raised whether, as in this case, the defendant would not receive costs in case of an acquittal, or the prosecutor not going to trial he should be made to pay costs for the indulgence granted him. The case in 1 Esp. N. P. C. 126, is an authority to shew that when a defendant on an indictment for perjury puts off the trial, as in this case, he must pay costs, — that must be upon the principle that an indulgence is granted to him which ought not to occasion additional expense. In 3 Burr. 1305, it is stated by Lord *Mansfield* that in informations or misdemeanours the constant course of the court is, that the defendant is entitled to costs if the prosecutor gives notice of trial and neither goes to trial nor countermands it in time, so that it is clear that when the King is party costs may be receiveable when there has been a default on one side or an indulgence on the other, although upon a conviction or acquittal none would be taxable. That the argument of want of reciprocity is not conclusive appears from the case in Cowper 367. In *qui tam* actions for penalties, costs are in general not recoverable against the defendant, and yet when such an action is compounded with leave of the court it is made a condition that they shall be paid. In 1 Salk. 193, it is said, the King pays costs for an amendment, and this exception to the general rule must arise from its being an indulgence. In 3 Price 72, the Crown had

obtained a verdict for penalties, and a new trial was moved for on the ground of no notice of trial to one of the defendants. On the part of the Crown it was answered that the defendants were partners, and that notice to the clerk in court of one was notice to both. The court decided that under the circumstances each defendant was entitled to a separate notice, and they made the rule absolute as to both defendants. The costs of the trial to abide the event of the verdict.

Here is a case of proceeding precisely similar. An information by the *Attorney-General* for penalties under the Revenue Act, where no costs on verdict are taxable against the defendant, but the court in granting a new trial thought it was reasonable under the circumstances that the Crown should not bear the expense of the last trial if the prosecution should in this end prove to be well founded, and they therefore annexed a condition that the costs of the trial should be paid to the Crown. In many cases, when under the general principle the King would have no right to costs, the legislature nevertheless takes care he shall have them when an indulgence is granted as in traverses in claims to goods seized, &c., it is made a condition that the party shall give bond to secure costs. Then here the court in exercising a discretion as to putting of a trial may impose a condition. Executors or administrators would pay costs for such an indulgence, an exception from the general principles. In 1 P. Wms. 227, *scire facias* to appeal a patent on a new trial, the defendant had to pay costs, though it is expressly said that the suit was carried on by

the *Attorney-General* at the proper expense of the Crown. There, too, the objection was expressly argued on the principle contended here.

SHERWOOD, J., thought the whole matter was in the discretion of the judge who presided at the trial.

MACAULAY, J.—It may be inferred from all the cases and the statutes regulating costs in various instances that the rule that the King neither receives nor pays costs is not universal, nor of late years inflexible. That such a principle is restricted rather to the ultimate costs than to costs incidental to interlocutory proceedings, and that it is discretionary with the court to grant relief or indulgence, not of right, but upon special application, whether moved for on behalf of the Crown or the subject, upon such terms as may be deemed equitable and just, of which the payment of costs is usually one. It follows that in putting off a trial at the instance of either the Crown or a subject standing in the place of a defendant the exaction of costs is discretionary, and having come to that opinion, I think it proper that the costs of the day should be paid on the present occasion.

CHURCH V. BARNHART.

After issue joined on *nul tiel record*, the court permitted the plaintiff to amend his declaration by submitting "promise and undertaking" for "promises and undertakings," on payment of costs after a trial.

DEBT on bond conditioned for the gaol limits. The plaintiff declared, setting forth a judgment upon certain promises and undertakings. The defendant pleaded amongst other pleas *nul tiel record*. Issue

was joined and notice of trial by the record given. A trial had taken place at the assizes. The plaintiff discovered that the original record was of a judgment upon a certain promise and undertaking. A motion to amend the declaration was then made by the *Solicitor-General*.

Baldwin contra.

CHIEF JUSTICE.—I have no doubt that the plaintiff may be allowed to amend. The cases in 2 Strange 892, 1 Salk. 52, and many authorities not of modern date, may be cited on the other side, but there are abundance of later authorities which justify the amendment, and as this is a mere slip there can be no doubt that the court should set it right. The cases in 1 Ea. 133, 2 Chit. Rep. 29. and 3 Taunt. 81, leave no doubt as to the discretion of the court in allowing the amendment after a plea of *nul tiel record*, and it is clear that it is not now regarded as an objection that such an amendment, by removing the variance, would falsify the defendant's plea, which was true when pleaded: the court takes care that the amendment is made on such terms that he has no reason to complain of injustice. With respect to any objection upon the ground that the amendment will be prejudicial to the interest of bail, the cases in 2 B. & P. 275, and Barn. 4, shew that there would be no hesitation on that ground. The latter case is strongly in point, and there is certainly no other doubt except that which first suggests itself, and which arises from the circumstances that the plaintiff has chosen here to try the issue and assess contingent damages, which seemed to bring the case

within the difficulty raised by the decision in *Robinson v. Raley*, 1 Burr. 322. Although that case seems difficult to be reconciled with what we find to be constantly done by the courts in latter times, still it is recognised as imposing a rule in the most respectable books of practice, and for the sake of uniformity, and to restrain irregularities, it may be proper to adhere to it when the amendment is only desired to save delay and costs, and when to refuse it will not finally conclude the plaintiff. Upon that principle this court in a late case did not grant leave to amend after demurrer, because contingent damages had been assessed, but here, as the plaintiff would be concluded, it would be unjust not to allow the amendment. And I think, upon the authority of several cases, it may be allowed, so as to enable the plaintiff to have judgment upon the plea, upon the condition, of course, of paying costs. It is possible the defendant may desire to avail himself of some other plea to the merits of the action, and in that case, if it should appear to the court that justice required it, I think he should be allowed to plead *de novo*, and all proceedings subsequent to the declaration must in that case be set aside.

SHERWOOD, J., agreed.

MACAULAY, J. — From a consideration of the cases I am of opinion plaintiff may have leave to amend upon the payment of costs—1 Burr. 316, 221, 293; 4 Burr. 2139; 3 Burr. 1244; 2 Chit. Rep. 27, 28; 7 T. R. 699, 704; 5 B. & A. 896; 3 Taunt. 81. And that leave to plead *de novo* is not granted of course, but only when from the nature of

the amendment and the defence it may appear necessary—4 Taunt. 588 ; 6 Taunt. 400. The authority conferred by the recent act of the provincial legislature on the subject of amendments seems also applicable to the point, were it necessary to resort to its provision.

Per Curiam.—Rule absolute

GATES ET AL. V. CROOKS.

The court will not grant a new trial upon the ground that the defendant's attorney had omitted to give notice of a deed, by which omission defendant was precluded from going into one branch of his defence, when the facts, if proved, would not have formed a legal bar to the action. A debt due to a bankrupt estate is a good consideration for notes for that debt given to the trustees and assignees of the estate. Notes given bearing interest for a period antecedent to their date are not usurious on that account, when it appears that the debt for which such notes were given was due and payable at the period from which the interest is to be computed.

ASSUMPSIT upon eight promissory notes by which the defendant and one Matthew Crooks jointly and severally promised to pay the plaintiffs by the name and description of the trustees of the late firm of Maitland, Garden and Auldjo the sums of money mentioned in each note.

The action was brought against the defendant alone, who pleaded the general issue to the whole declaration, but in fact objected to three of the notes only. These were drawn for £1605, 18s. 9d. each, with interest from a period of sixteen months prior to their dates. A verdict was rendered for the plaintiff for the full amount of the eight notes. The facts of the case were as follows:—In 1815 the defendant and Matthew Crooks were merchants in part-

nership in this province, under the firm of Matthew Crooks & Co. The house of Maitland, Garden, and Auldjo were their correspondents in Lower Canada, and supplied them with merchandise to carry on their business, which they regularly continued till the month of June 1818, when the firm of Matthew Crooks & Co. dissolved partnership. On the 25th September 1819, Maitland, Garden, and Auldjo informed Matthew Crooks by letter that they had consented to relieve the defendant from his responsibility to them for the debt of Matthew Crooks & Co., and at the same time requested Matthew Crooks to give them security on the whole of his fixed property. On the 22nd December 1820, Maitland, Garden and Auldjo informed the defendant by letter, that in case of any of Matthew Crooks' other creditors getting impatient, it would be important that the necessary securities should be completed on the Ancaster property, and on any other property which he might possess. A mortgage was given on part of Matthew Crooks' property, but not accepted by Maitland, Garden, and Auldjo. The last communication by letter from Maitland, Garden, and Auldjo, on the subject of the liability of the defendant to the payment of the debt due them by Matthew Crooks & Co. was on the 10th January 1826 addressed to the defendant, in which they say, "as matters have turned out we must resume our old position in respect to the estate of Matthew Crooks & Co., and look to the individual partners;" soon after which Maitland, Garden, and Auldjo failed, and assigned their effects, debts, &c., to the plaintiffs. On the 31st March 1821, Maitland, Garden, and Auldjo rendered an account to Matthew Crooks against the firm of

Matthew Crooks & Co., in which the balance due Maitland, Garden, and Auldjo was stated to be £5924, 4s. 9d., and Matthew Crooks in his testimony at the trial stated he thought that account correct. The defendant's counsel offered at the trial secondary evidence of the contents of a mortgage held by the plaintiffs for this sum, which evidence was rejected by the court for want of proof of notice to produce the original, and which notice defendant's attorney neglected to give, although notice had been given at a former trial. In August 1826 defendant went to Montreal with his brother Matthew, and at an interview with two of the partners of Maitland, Garden, and Auldjo, and the plaintiffs, for the purpose of a settlement, defendant contended he was discharged by the mortgage and the correspondence with Maitland, Garden, and Auldjo. The plaintiffs insisted the contrary, and threatened to arrest him and try the question in Lower Canada immediately; upon which, after some discussion, the three notes in question were given. Verdict for the plaintiffs.

The *Attorney-General* moved for a new trial on the following grounds:

1st. The defendant was prevented by the negligence of his attorney from making a full defence.

2nd. The notes are void for want of consideration.

3rd. They are usurious on the face of them and therefore void.

The *Solicitor-General* shewed cause.

SHERWOOD, J.—(After stating the case) — The plaintiff's counsel made a preliminary objection to this application in his argument against making this rule absolute, and insisted that the negligence or default of the attorney will never be allowed to induce the court to grant a new trial, and cited the case in 2 T. R. 113. That case, however, does not seem to warrant the position, for it clearly appears it was owing to the defendant's own neglect in that case that a full defence was not made; the negligence of the attorney was therefore not in question. In 3 Taunt. 484, the Court of Common Pleas granted a new trial in a cause which was meant to be defended, but was called on and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his brief to the counsel employed, and the court ordered the attorney to pay all costs out of his own pocket as between attorney and client. So far as relates to the negligence of an attorney forming a ground for a new trial, it appears to me there is no difference in principle between the present case and that which I have last cited; and if I were convinced the deed of mortgage would form a just and legal defence to any part of the plaintiff's claim, I would grant a new trial upon payment of costs on the authority of that case. In order therefore to dispose of the first ground urged by the defendant for a new trial, it will be necessary to ascertain whether the deed of mortgage, if produced, would have formed a good defence to any part of the plaintiff's claim. The counsel for the defendant alleges that the simple contract debt due Maitland, Garden, and Auldjo by Matthew Crooks & Co. was extinguished by the mortgage executed

by Matthew Crooks, and delivered to the plaintiffs in this cause, and consequently that there was no consideration for the notes in question. In Bac. Abr., title Extinguishment D., it is stated as a general rule of law, on the authority of Roll. Abr. 470, 604, 6 Co. 44, and Yel. 38, that if a creditor by simple contract accepts an obligation this extinguishes the simple contract debt. The rule of law thus generally laid down appears to me to be subject to some qualification. If it should be the clear intention and meaning of the parties that the obligation should operate as an additional and collateral security only, I think the simple contract debt would not be extinguished as in 3 B. & C. 208. In that case *Bayley, J.*, adverting to the general rule of law with respect to extinguishment, says, "In general, when a simple contract security for a debt is given it is extinguished by a specialty security, if the remedy given by the latter is co-extensive with that which the creditor had upon the former."

In the present case, however, I think it unnecessary to examine whether the remedy given by the mortgage was co-extensive with the remedy on the simple contract debt or not, because it does not appear from the evidence that Maitland, Garden, and Auldjo ever accepted the specialty security. On the 26th September 1820 they expressed their intention to do so, but on the 10th January 1826 they expressly declare that a change of circumstances had determined them to adhere to the original contract, and to retain their remedy against both partners in the firm of Matthew Crooks & Co. The assent of one of the partners in 1824 or 1825

to the registry of the mortgage, does not, in my opinion, amount to an acceptance of the deed, because it does not appear by the defendant's affidavit that he gave him notice of what premises were mentioned in the deed, or what sum was secured by it, or what period was fixed for payment. Maitland, Garden, and Auldjo requested security on all the real property possessed by Matthew Crooks, but whether the mortgage embraces the whole of his property does not appear, nor does the affidavit show what premises are mentioned in the mortgage, or that any of the parties or their attorney ever perused the deed. What is the extent of the power of the trustees I am not aware, but I see nothing in this case to warrant the opinion that they were clothed with legal authority either to accept or reject the mortgage for Maitland, Garden, and Auldjo, nor does it appear by the laws of Lower Canada, where the notes were given, that a specialty security *per se* merges a simple contract. The case, however, seems to me to be relieved from difficulty by the act of the defendant himself. In the month of August 1826 he went to Lower Canada and took the mortgage with him, and he states in his affidavit that he gave it to the trustees of the estate of Maitland, Garden, and Auldjo, the plaintiffs in this cause. On the 23rd of the same month the defendant, his brother Matthew, George Garden, George Auldjo, and the plaintiffs in this cause, met for the purpose of a settlement; at the same time the defendant contended that he was wholly discharged from his liability to the payment of any part of the debt due by Matthew Crooks & Co. to Maitland, Garden, and Auldjo. The plaintiffs on the other hand insisted on

his liability at that time, and were desirous of trying the question in the Court of King's Bench for the district of Montreal. They alleged the existence of the simple contract debt, and contended that the defendant was still a partner and liable to Maitland, Garden, and Auldjo for the balance due them by Matthew Crooks & Co. The defendant therefore had a fair opportunity of a legal investigation of the question, and of ascertaining whether by the laws of Lower Canada he was then liable as a partner on the original contract which had been made in that province. At length all the parties came to an arrangement, and the defendant and his former partner signed the notes in question. Now, it appears to me this was an explicit admission at that time of his liability as a partner; he certainly knew all the facts; he had an opportunity of contesting the matter and of obtaining a judgment on the point of law, and he was fully apprised of the determination of the other party to have a judicial decision on the question. Under these circumstances he elects to determine for himself, and admits his liability, and it is quite impossible for me to say he was not right in doing so, according to the laws of the country in which the transaction occurred. The principle established in 5 B. & A. 117, goes to prove that the defendant ought to be bound by the election which he then made, and, in my opinion, it is too late for him to dispute his liability as a partner after the settlement which took place in Montreal.

The second objection is the want of consideration. The counsel for the defendant contends that no consideration whatever moved from the present plain-

tiffs to the defendant, because they were total strangers to the original contract between Maitland, Garden, and Auldjo, and Matthew Crooks & Co., and had no interest in the debt due on that contract. That the debt alleged to be so due formed the basis of the contract upon which this action is brought, and was the sole consideration for giving the notes in question, the payment of which the defendant resists. This objection proceeds upon the maxim that the legal interest in a simple contract resides with the party from whom its consideration moves, and that he alone can support an action at law on the contract. This rule is certainly recognised in many cases, among which may be ranged the following:—Hob. 44, pl. 117 ; 8 Mod. 116 ; 1 Vent. 6 ; Str. 592. But there are other cases which are equally good to prove that the rule does not always prevail, such as 2 Lev. 210 ; 1 Ventr. 318 ; 1 B. & P. 101, note c. I think the rule, at all events as regards negociable securities, is now obsolete, if it were ever in force in such cases. If a note is made payable to A. or order for the use of B., the legal interest is in A.—Chit. on bills 123, 280 ; 2 Vent. 307 ; Skin. 264 ; 6 T. R. 124—and B. has only an equitable interest. In the present case the notes are drawn payable to the plaintiffs as trustees of the late firm of Maitland, Garden, and Auldjo, and consequently if they receive the money it will be received in trust for Maitland, Garden, and Auldjo, to be paid to them or to their creditors according to the terms of the agreement under which the plaintiffs are authorised to act as trustees. Two of the firm of Maitland, Garden, and Auldjo were present at the settlement before mentioned, and I can draw no other conclusion from

the testimony than that they assented to it, and to the execution of the securities in consequence of it, and presuming this conclusion to be correct, I think the notes are equally valid as if they were drawn in the names of Maitland, Garden, and Auldjo. The notes are payable to their use with their apparent approbation and consent. It now remains to examine whether a legal consideration was given for the notes. After the admission of the defendant, as before stated, of his liability as a partner to that payment of the debt due by the firm of Matthew Crooks & Co., when he possessed a full knowledge of the facts and might have contested the question at law, I think I am bound to consider him liable; and then it appears that he and his partner in their settlement in Lower Canada with the plaintiffs as trustees, and two of the partners, agreed to a composition, and that the trustees and the two partners of the firm of Maitland, Garden, and Auldjo agreed to accept the three notes in question for the amount of a composition of 13s. 4d. in the pound on the original debt due by Matthew Crooks & Co. to Maitland, Garden, and Auldjo. Matthew Crooks was also indebted to that firm in his individual capacity, and the composition included his debt at 6s. 8d. in the pound, for which the defendant agreed to be surety, and accordingly signed all the notes with Matthew Crooks jointly and severally, which secured the payment of the composition money on both demands. The defendant was not originally responsible for any part of the debt due by Matthew Crooks alone. The account against the firm of Matthew Crooks & Co. and the one against Matthew Crooks individually were blended together, and settled at the same time and under the same agreement.

By this composition I think the original contract with Matthew Crooks & Co. was extinguished, and that Maitland, Garden, and Auldjo cannot now sue upon it.—8 Taunt. 277. There was also a further time given to the defendant to pay the debt, and this forbearance forms a material part of the consideration for the notes.

The counsel for the defendant contended that the acceptance of a smaller sum cannot operate as a satisfaction for a larger sum after the debt is due, and there is no doubt, I think, of the correctness of this position. To produce that effect something else is necessary; the acceptance of the smaller sum itself is not enough. In the present case there was another consideration; a benefit accrued to Maitland, Garden, and Auldjo, by the defendant becoming security for his brother's debt, and, in my opinion, the composition of 13s. 4d. in the pound would not have been effected if the defendant had refused his responsibility for the debt due by Matthew Crooks alone. I think, therefore, that the agreement and composition operated as an accord and satisfaction of the original debts due by Matthew Crooks & Co. and Matthew Crooks alone, to Maitland, Garden, and Auldjo.—4 B. & C. 507.

The last objection is, that the notes are usurious on the face of them, and therefore void. After as full a consideration as I have been able to give the subject, I incline to think the notes are valid. The debt from Matthew Crooks & Co. had been due for five years or more before the notes were executed, and it is a constant practice in England and here to

give interest in damages on a balance of an account between merchant and merchant which appears to be due for a length of time.—12 Ea. 419; 2 B. & P. 337; 3 Camp. 467; 3 Bing. 353. The notes bear interest for only sixteen months before their date, and if the interest for that period had been made a part of the principal and included in the notes, I think they would not have exceeded the measure of damages which a jury would have given had the question been referred to them. I am not of opinion, therefore, that the notes are tainted with usury.

Upon the whole, I cannot think the defendant has shewn sufficient grounds to warrant this court in granting a new trial, and I think the rule should be discharged.

The CHIEF JUSTICE and MACAULAY, J., expressed no opinion.

Per Curiam.—Rule discharged.

MAITLAND ET AL V. SECORD.

The court will not interfere to reduce the sum endorsed to levy on a *fi. fa.* on a strict legal ground, unless the defendant has an equitable ground to sustain his application. *Qu.* When the defendant gave a bond payable at a distant period, and the plaintiffs continued their dealings with him, rendering accounts which contained debits and credits, and which accounts included the sum for which the bond was given, though the last of them was rendered before the time for the payment of the bond had arrived, can the defendant treat the credits contained in those accounts as payment on the bond?

The facts of this case are detailed in a report of the decision of this court on the points reserved at the trial. (*Post*, at end of this term.) *Ridout* obtained a rule returnable the first day of this term, to shew cause why the amount endorsed to be levied

on the writ of *fi. fa.* against the lands and tenements of the defendant (£1969, 12s. 11d.) should not be reduced, by deducting from it the amount of the credits contained in the accounts current, and also the value put by the jury on the consignment of flour to Halifax, which put together would exceed the sum due the plaintiffs on the bond.

Draper shewed cause.

The CHIEF JUSTICE having been retained by the plaintiffs in this cause when at the bar gave no opinion.

SHERWOOD, J.—(After stating the case)—It seems somewhat extraordinary that the plaintiffs should continue to include in their accounts current with the defendant alone the amount of the debt formerly due by the defendant and his partner, because the simple contract made by the defendant and his partner had been wholly extinguished by the bond, conformably to the express intention and agreement of the parties. They did so, however, and the question now is, how shall the payments made by the defendant be applied? Shall they go to satisfy a debt which was due when they were made, or a debt which was not then due, nor till a considerable time afterwards? The cases decided in courts of law anterior to the case in 2 B. & A. 39, with few exceptions, went to establish the principle that when there are distinct accounts, and a general payment is made by the debtor without a specific appropriation to a particular account, the creditor may at any time apply such payment to which account he thinks

proper.—14 East. 239 ; 5 Taunt. 597. A distinction, however, was taken in the case in 2 B. & A. 39, and about two years afterwards in the case in 2 B. & B. 70, to this effect, that when there are distinct accounts and demands blended together in one account, and they are all treated by both parties as forming one account only, and the debtor makes a general payment on such account, the law will intend that it was paid and received in satisfaction of the first debt or account in order of time rather than of the later items. The two last cases were decided on the authority of a decree in the Court of Chancery in Clayton's case, reported in 1 Mer. 530 ; and it appears by that case, as well as the cases at law which shortly followed, that all the debts or demands so blended in one entire account were actually due at the time the general payments were made by the debtors. These late decisions, like the former, admitted the right of the creditor to apply a general payment to the satisfaction of any particular demand, when he possesses several, but decide that he has made his election when he gives credit on an account which ostensibly blends all the accounts existing between the parties into one, and that the giving credit in that way evidently shews an intention of receiving the payment in satisfaction of the early items in the account rather than late items. Sir *Wm. Grant* said in Clayton's case—"It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other." All the cases clearly shew that if the debtor make no specific appropriation of the money he pays to a creditor having several distinct

demands, the creditor may himself apply the payment in satisfaction of which debt he pleases—this is a legal right which he can exercise at pleasure without consent of the debtor; indeed the consent of the debtor is never presumed, he waives his right to interfere in the appropriation when he declines exercising it in the first instance, and at the time he makes payment. I am not aware of any case which allows an *ex post facto* right of appropriation to a debtor.

The present case, in my opinion, differs in a material point from those already cited. Although it agrees with them in shewing that the creditors blended in one account several distinct demands against the debtor, still it proves, at the same time, that the first item of the accounts made out by the plaintiffs consisted entirely of the simple contract debt due by the defendant and his former partner, which had been fully satisfied by the bond which the defendant executed, payable in December 1826, a period long subsequent to all the payments credited in the accounts. It further proves that the remaining items of the account were due when the defendant made payments. I am inclined to think, whenever the plaintiffs gave the defendant credit in their accounts, they by such act appropriated the moneys so credited in discharge of the earliest item in point of time which was then due. I am also of opinion they had no right to apply such payments in satisfaction of any item not then due, without the particular direction or consent of the defendant, which does not appear to have been given. The consent of the defendant cannot, in my opinion, be inferred from the

mere circumstance of his receiving the accounts without objection to the manner in which they were made out, because both parties must have been fully aware that the first item of the accounts was embraced in the bond, and consequently that the time of its payment had been fixed to a period long subsequent by the solemn contract of the parties themselves under seal. I think it more consistent with reason, and the ordinary transactions of men in business, to infer that the defendant intended to pay the plaintiffs that part of their account which he knew was due at that time, and the payment of which the plaintiffs had a legal right to enforce, rather than a part which he well knew was not due, but had been fully satisfied by a bond upon which the plaintiffs could bring no action for some years. Indeed, considering the nature of the two debts, I am inclined to think the plaintiffs themselves could not prefer receiving payment of the specialty debt before the simple contract debt, because an executor or administrator is obliged to pay a debt on bond before a simple contract debt, although the latter is due and the debt on specialty is not; and it has been adjudged that if an action be brought against an executor on the simple contract of the testator, he may plead that his testator entered into a bond payable at a future day, and it shall accordingly cover assets to the full amount of the sum payable by the condition.—Leon. 187; Cro. Eliz. 315; 3 Lev. 57; Cro. Car. 362; Ca. temp. Hardw. 228. The defendant had an undoubted right to pay the debt on bond before it became due if he thought proper, but there is not express evidence that he did; on the contrary, it appears that his payments were general, without any order for a

specific appropriation at the time of making them, and consequently that the defendant resigned the right to the plaintiffs of applying the money, and I think it was not in the power of the defendant at any time afterwards to resume the right.—2 Ver. 607. It was once with him, but it passed to the plaintiffs by his implied consent.—Str. 1195.

The plaintiffs therefore having the exclusive right of appropriation, it remains to determine how they could legally exercise it, for, in my opinion, whatever might have been their real intention, it must now be presumed they applied the payments in discharge of those items in the accounts which the law sanctioned when the credits were actually given. According to the rule in Clayton's case they were bound by the act of giving credit.

There is one circumstance which throws some light on this part of the subject, and as far as *ex post facto* acts may be allowed to explain antecedent conduct, affords a presumption that the plaintiffs applied the payments in discharge of the debits for merchandise; they made no demand of payment of that part of the accounts, although it became payable more than a year before the bond was due, but they brought this action on the bond without any delay, thereby shewing their own impression of the manner in which the payment of the defendant had been previously applied by themselves. In my view of the present case, the plaintiffs were not warranted in making any other appropriation of the different payments than the satisfaction of the debt due at the time of the application of each payment, by giving credit for the

same in the accounts current. I think there are decisions which establish this proposition that a creditor having several distinct claims against his debtor cannot apply a payment made on account generally to the satisfaction of a demand, to which at the time of applying the credit he has not a clear *prima facie* right of payment. The first case I will mention is Str. 1195. S. B. was indebted to the plaintiff at the time of his death for coals; he made his wife executrix; she continued to deal with the plaintiff and received coals on her own account; then she married the defendant, who also received coals on his own account, and afterwards made several payments on account generally, without making any appropriation to a particular demand. These payments altogether were sufficient to discharge the demand against the executrix as well as the debt she contracted while a widow. The plaintiff brought his action for the price of the coals delivered to the defendant after he had married the widow. The court held that the defendant, by virtue of the marriage, was equally liable on the account against his wife before marriage as he was on the account against himself after marriage, and that the plaintiff had a right to apply the money received to the discharge of these two debts, but as the demand against the executrix was not certain, but depended on the question whether the executrix had assets or not, as well as on the manner in which they should be administered, the court were of opinion the plaintiff could not apply any part of the money received from the defendant in discharge of the latter demands. The case in 2 Star. N. P. 74, will further illustrate the principle. The plaintiffs held bills of exchange which had been accepted by the defendant,

and they also were in legal possession of a deed of mortgage given by the defendant to a third person, and by him sold to the plaintiffs, but no assignment had been actually made. The plaintiffs, however, had a right to compel an assignment of the mortgage to them by a bill in equity. The defendant paid the plaintiffs a sum of money on account generally, and took a receipt for it in that way, which the plaintiffs appropriated to the satisfaction of the debt secured by the mortgage, and brought an action against the defendant on his accepted bills. On the part of the plaintiff it was contended that the payment was a general one, made on account not merely of the bills of exchange, but likewise of the mortgage, for which he had a good claim in equity, and from which the defendant could not extricate himself without an actual payment of the debt due on the mortgage. Lord *Ellenborough* said, "They might have a claim if proper means were used, by application to a Court of Equity, but the payment was on account generally, and was applicable to any existing demand, but no legal demand existed except on the bills. I cannot go beyond the terms of the receipt; on account there means an account which the defendant was liable to pay, but he was liable on the bills of exchange only; then there is a qualification without prejudice to any claim we have upon any securities, but they were not in a situation to make a claim on any other securities."

In the case now before this court the plaintiffs were not in a situation when the credits were given by them in their accounts current to enforce the payment of any demand, except that for the goods

advanced to the defendant after the execution of the bond, and therefore they had no legal right to apply the moneys received from the defendant to the payment of any other debt. In my opinion, that claim was satisfied by the credits given by the plaintiffs in their accounts current, and the debt which afterwards became due on the bond is still unpaid. The defendant moved the court for a rule *nisi* calling on the plaintiffs to shew cause why the sum of £1343, 5s. 5d. should not be deducted from the amount of the endorsement on the writ of *fi. fa.* against the lands and tenements of the defendant, and now in the hands of the sheriff, upon the ground that that amount had been paid in discharge of the debt due on the bond. For the reasons already stated, I think the rule must be discharged on the ground that the plaintiffs had no legal authority to credit the money in discharge of a demand not due when they gave the credit.

MACAULAY, J.—This is a motion to reduce the levy under the *fi. fa.* against lands issued in this cause. The leading facts of the case are contained in the report of the decision of the court upon the points reserved at *nisi prius*, and it is now stated that in pursuance of the judgment recovered by the plaintiffs upon the decision, they have directed the levy of the whole sum specified in the condition of the bond £1337, and interest from 4th December 1822. The cases cited in argument, I think, established, that when various money demands being due are mingled in one set of accounts, and all payments being made without appropriation by the debtor, are by the creditor, in his discretion, introduced into

the general account, such payments, both at law and in equity, are to be applied in reduction of the earliest in preference to any subsequent items; but no case is found in which the effect of such entries is determined when the earliest charges consisted of items upon which a credit was running, not expired when the payments on account were introduced, though subsequent items were at such periods due and payable. Authorities, however, were produced to shew (if it could be doubted) that a creditor (having a right to elect the application) cannot, contrary to or without the assent, express or implied, of the debtor, appropriate any advances in reduction of demands not due in preference to others subsisting and payable at the time, yet no case would seem to hold that with the assent of the payor the payee might not apply the credit to one as well as the other. The present case differs in some of its features from all that I have seen in the books, inasmuch as in them all the items were due, while here the first item of the accounts current was not payable, by reason of an extension of credit under the bond, but, nevertheless, it has been included in account as if it formed a subsisting balance due presently, and has been placed at the head of, mingled with, and in all respects placed upon the same footing with other demands actually payable; and the credits have been entered promiscuously in the general account current, without specific application, notwithstanding such accounts embraced the old balance not payable in common with later charges for subsequent advances upon which the credit had expired, still the defendant did not dissent from the course adopted by the plaintiffs; and previous to the commencement

of this suit the item in question became payable, and the defendant is now willing and desirous to abide by the rule of construction that would have prevailed had it been due from the beginning, an object which the plaintiffs desire to avoid.

The bond declared upon merged the simple contract debt, yet it is obvious how the plaintiffs happened to include the same demand in the accounts current. The debt was originally contracted for mercantile advances of goods, moneys, &c., by the plaintiffs' house to defendant and his brother, and was payable and had been bearing interest before and at the time the bond of defendant alone was taken and substituted for it; and as defendant, after assuming this balance, continued on his sole account, a course of dealing with the same house similar to that previously carried on by the partnership, and as by the course of mercantile dealing and of the dealing between these parties annual rests were made and the arrears of interest turned into principal at each yearly rest, it is obvious, that without regard to the bond bearing interest from the 4th December 1822 merely, the plaintiffs conceived it open to them to continue the old balance in account, charging interest from 31st March 1822, at which period it was struck, and after the rendition of a series of such accounts, unexcepted to by the defendant, I think it may be fairly presumed, that if not expressly agreed to, it was mutually conceded or understood, that the order of accounts observed by the plaintiffs was regular, approved of, and acquiesced in, so that it would not lie with the plaintiffs at least to dissent from the accounts rendered with a view to

an evasion of the legal consequences as respects the balance in 1822. Had the plaintiffs been constrained to rely on the accounts rendered in support of their action, the defendant could unquestionably avail himself of the usual application of the credits, but as the accounts, even if affording sufficient evidence of an account stated, would not merge the bond (1 Burr. 9), it was competent to plaintiffs to sue upon the specialty, however the accounts transmitted in ordinary and due course of dealing would of themselves have amounted to *prima facie* proof of an account stated (2 Atk. 252; 2 Vern. 276), in action of assumpsit and in absence of the bond. The independent remedy in the plaintiffs' hands obliged the defendant to resort to and introduce the accounts in evidence, with a view to establish partial payments. I think it was competent for him to do so, but he shews at the same time that, independent of the bond, a large balance upon subsequent dealings remains due the plaintiffs on the same accounts, after deducting all credits. It has been determined that, had the defendant been allowed the benefits of all the payments credited in these accounts he could not sustain the issues created by his pleas, and the plaintiffs having obtained a judgment for the whole penalty, as they legally might do, and issue execution without any further suggestion of breaches (5 Moore 198; 2 Chit. rep. 697; 3 Price 219), it becomes a question whether it is the rigid duty of the court now to interfere, upon motion to restrain the levy, or merely discretionary, according to the equitable circumstances of the case. I have no doubt of the power of the court to interfere even now, and perhaps by additional pleas the defendant might have

entitled himself to a strict legal adjudication on the point, but I incline to believe that a summary application is to the equity and discretion of the court to be exercised with a view to substantial justice. The plaintiffs by prosecuting the bond seek to take the first item out of the accounts current, and waive all right to compound interest thereon, and I have not discovered that the defendant, either at the trial or on the present occasion, has sought to restore it, so as to be governed in all respects by those accounts; but, on the contrary, it seems to me the defendant likewise desires to withdraw the first item, in order to ascertain the amount at simple interest, and then to restore it at that reduced rate in order to meet the credits of the opposite side. I am much disposed to think the accounts must in all respects subsist entire in their present shape, on the debit side, if the defendant desires any advantage in construction from the credits. It would seem just, that if he exercises a right of review in one respect the plaintiffs might claim a similar right in another; that if the defendant is not concluded neither should the plaintiffs be so; and that if the accounts are to be remodelled on the one side, an equal privilege should hold on the other; still as the debit side is merely exceptionable in respect to the mode of reckoning interest, and since a revision in that behalf could not effect the application of the credits, it is not perfectly clear that the amount of the first item at simple interest might not be ascertained without abstracting it from or opening the accounts, though at the same time plaintiffs might reasonably be allowed to say, we only made such an application of the credits in consideration of the first item being continued from the old account, as due

presently, and as a mercantile balance liable to accumulate at compound interest, to which defendant has hitherto assented, tacitly at least, and if he now desires abatement with a view to be charged with simple interest only, we will specify anew the appropriations of the credits in order to apply them exclusively to the other mercantile transactions embraced in the same set of accounts, a course to which the defendant should not object, as we thereby reduce a debt at compound interest in preference to one at simple interest merely. Upon the most deliberate consideration of the authorities, I am led to the conclusion that although the first item was not payable until after the period of the last account rendered, yet the credits in the accounts rendered being all along acquiesced in as made, it is not in the election of either party to dissent from them now that it has become due; but that whatever the rule of law on the subject of interest might be, the application of the payments must be governed by the rule fully established both in law and equity, viz., that the earliest items are to be first paid; and if the present application depended merely upon the construction of the accounts, with a view to the application of the credits, even admitting that under the bond the first item did not accrue payable until December 1826, I should be obliged to hold that the principle to be extracted from Clayton's case (1 Mer. 572, 623, and 2 B. & A. 39) must govern.

But this is an application to the discretion of the court, to be exercised soundly, and subordinate to the true ends of substantial justice in this particular case. The court cannot fail to see the nature and

origin of this debt, the way it came into the accounts current, and that the ultimate balance has yearly increased instead of experiencing diminution by the intermediate payments. Were it apparent that the defendant would have to pay twice over the sum now prayed to be abated in the levy, unless a restraint were imposed upon the plaintiffs; in other words, if the debit side of the accounts contained no items but the one in controversy, or none unliquidated, then, while it would confirm my view of the rule of application, it would be manifest injustice if the defendant were not protected to the extent of the credits; but when he himself shews on the face of the same accounts that he has contracted a large debt on simple contract for advances on the bond bearing compound interest according to mercantile usages, and that after allowing full credit for all payments a balance would still remain due the plaintiffs independent of the bond, and that applied to the items of simple contract, a debt accumulating at compound interest would be reduced, while by detaching the first item from the accounts, a large sum included therein by a similar computation is reduced to simple interest, it appears to me that there is no merit in the defendant's object, if prejudicial to bailiffs, which does not appear. On the contrary, as far as disclosed to the court, it would seem that the course pursued by the plaintiffs is most beneficial for the defendant, as exonerating him from compound interest on one large sum, and to the full extent of all his payments reducing in his favour other demands liable to accumulate by the conversion of arrears of interest into principal at each annual rest; and upon the whole, in the exercise of a sound discretion, I think the present

rule should be discharged, and more especially as there is not a unison of opinion in the court upon the main question—a question not free from intricacy and doubt, and though liable to affect to a large extent the interests of the plaintiffs, not in a shape to be by them carried in appeal to a higher resort in the event of an adverse decision.

Per Curiam.—Rule discharged.

DOE EX. DEM. PELL V. MITCHENER.

Where A. being seised of real estate conveyed to B. and died, and A.'s heir conveyed the same premises to C., who had his deed registered immediately. *Held* that under the provisional act the deed last registered is fraudulent and void as against the deed first registered, though C. had notice of this deed when he purchased.

EJECTMENT for premises in the district of Niagara. The facts were—the lessor of the plaintiff claimed under a registered title; his father being seised of the premises by such a title, in 1820 conveyed to him. Some years ago the heir at law of the father recovered in ejectment from the lessor of the plaintiff the premises in question, and afterwards conveyed the same for a valuable consideration to the landlord of the present defendant, whose title under such heir at law was duly registered before the conveyance from the lessor's father, under which he claims title, was registered. The purchaser had notice of the prior deed. At the trial a verdict was rendered for the lessor of the plaintiff, subject to be set aside and a nonsuit entered if the court above should decide in favour of the defendant upon points reserved. The case was argued in Hilary Term by *Draper* for the plaintiff, and the *Attorney-General* for

the defendant. The decision of the court was confined to the last point, which was in substance as follows: that the deed from the father to the lessor of the plaintiff having been registered subsequent to that given by the heir at law, was fraudulent and void, under the Registry Act 35 Geo. III., ch. 5, sec. 2.

The CHIEF JUSTICE having been retained for the defence when at the bar, gave no opinion.

SHERWOOD, J.—The provincial statute 35 Geo. III. enacts in substance, that after the confirmation of land to any person, by grant from the Crown, under the great seal of the province, a memorial of any deed or conveyance of such land may be registered, and that any deed or conveyance made after a memorial is so registered, of any part of the land contained in such registered memorial, shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered in the manner described by the act, before a memorial of the deed or conveyance under which such subsequent purchaser or mortgagee claims, shall be registered. This act, generally, in its most important provisions, and particularly in the part to which I have alluded, is substantially to the same effect as the Registry Act in England; many parts of it indeed are copied verbatim from the 2d and 3d Anne, ch. 4. Neither the Registry Acts in England nor the one in this province make the registry of deeds imperative on the grantee; he may cause a memorial to be registered or not at his election. No deed unregistered is de-

clared void by this statute, except against a subsequent purchaser, for valuable consideration of land mentioned in some prior registered memorial; and therefore in the absence of such subsequent conveyance a deed of feoffment or lease and release might be valid. As our Registry Act is in strict analogy with the statutes 2 & 3 Anne, ch. 4; 5 Anne, ch. 18; 7 Anne, ch. 20, and 8 Geo. II., ch. 6, the decisions in England on the present question would be deemed conclusive. Mr. *Sugden*, in his learned treatise on vendors and purchasers, 587, speaking of the relief to which the first purchaser would be entitled in a court of equity in case the subsequent purchaser had notice of the prior conveyance before he bought, makes the following remarks:—"It will occur to the learned reader that although the prior purchaser would in a case of this nature be relieved against the subsequent sale (that is in equity), yet the legal estate would be vested in the subsequent purchaser by force of the statute." In support of the equitable position he cites among other cases 3 Atk. 645, Scho. & Lef. 821. But the doctrine at that time rested entirely on his own opinion of the proper construction of the Registry Act, as no decision in a court of law had yet occurred. About eight years afterwards the case in 5 B. & A. 146, was decided in the Court of King's Bench, in complete accordance with Mr. *Sugden's* opinion. The court determined that where there were two deeds executed in the county of Middlesex, affecting the same premises, and the one executed last was registered first, the deed last registered must be considered in a court of law as fraudulent and void, in consequence of 7 Anne, ch. 20. *Abbot*, C. J.,

said on that occasion—"A court of law is now called upon for the first time to put a construction on the words of this statute, by which it is enacted that every deed or conveyance which shall after the 29th September 1709 be made and executed, shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered before the registering of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. Now it is impossible that plainer words could be used, and I think that sitting in a court of law we are bound to give effect to them, and we cannot say that this deed is not fraudulent and void within the meaning of the act, because possibly it may turn out on examination that the defendant is entitled to some relief in equity."

I see no material difference between the 7 Anne, and the Register Act in this province, so far as relates to the question now before the court, and feel compelled to follow the authority which I have just cited, and say that the deed last registered must be adjudged fraudulent and void, conformably to the enactment of the Register Act of this province. The statute applies, in my opinion, to every description of deed and conveyance affecting real property, and executed after a *memorial* comprising or containing such property has been registered, because such a proceeding is considered in law a sufficient notice that all deeds of the same premises executed afterwards must be registered. Under such circumstances if two deeds are given of the same premises, the last, if registered first, will hold

them, although the first may also be registered, because the act of registering the first deed comes too late to authenticate the instrument; it is no more valid as respects the second deed than if it never were registered. The court is not clothed with authority to modify the strict rule of law established by the words of the Registry Act, although the equitable circumstances of the case might possibly be found, upon an examination by an equitable tribunal, to warrant such a measure. In all such instances resort must be had to a court of equity. I am therefore of opinion the present verdict must be set aside and a nonsuit entered.

MACAULAY, J.—It appears to me the case in 5 B. & A. settles the question, and that as a court of law we are here constrained to abide by that decision. There is certainly room for much argument in favour of an extension of the rule in equity to courts of law; but the tendency of several cases is to establish a distinction, and the only adjudged case in a court of law is positive. Until that decision is reversed I conceive the point determined. It follows, that notwithstanding notice of the lessor's claim, the registered title of the landlord of defendant under the deed of the heir at law of the party under whom the lessor claims is conclusive against the deed of the latter not registered, until after that of the former, even if since duly registered according to the provisions of the statute.

It is unnecessary to enter upon the other points reserved, and if the parties interested are not satisfied with the present result, I see no alternative, except a special verdict in which all the questions

may be carried by appeal to the last resort—the King in Council.

Vide 1 Ves. 67; 1 Eq. Ca. abr. 356; 9 Ves. 407; Str. 664; 3 Atk. 646; 2 Atk. 275; Amb. 624; 3 Ves. 478; 19 Ves. 439.

Per Curiam.—Nonsuit entered. (*a*)

WASHBURN V. FOTHERGILL.

A party has the same time to plead after particulars are delivered on a judge's order as he had after the summons was returnable.

King moved to set aside the interlocutory judgment and assessment of damages in this cause for irregularity, on the following objections: 1st, That the plaintiff sued by attachment of privilege, while the King's Bench Act, 2 Geo. IV., ch. 1, enacted that the original writ should be a *ca. re*. 2nd, That there was no rule to plead, which he contended was necessary, if the mode of suing by attachment of privilege is sustained. 3rd, That the interlocutory judgment was signed too soon. The judgment had been signed at the opening of the Crown Office on Monday morning. On the Friday previous the defendant took out a summons, returnable before a judge in chambers the following day, for particulars of the plaintiff's demand. The same day the plaintiff's attorney having been served with the summons, delivered a bill of particulars. On the return of the summons the defendant got a judge's order for particulars, and served the same immediately on the plaintiff's attorney, who after the closing of the

(*a*) See *Doe v. Meyers*, 2 Old Series, 424; *Doe v. Atkinson*, 4 Old Series, 140; *Neeson v. Eastwood*, 4 U. C. Q. B. 271; *Doe v. Smith*, 7 U. C. Q. B. 376; and see the Registry Act, Consolidated Statutes U. C., ch. 89.

Crown Office on that day (Saturday), delivered a second bill of particulars to the defendant's attorney.

The court after hearing *Washburn*, decided that the mode of proceeding by attachment was saved by the statute, or if not, that the defendant had waived the objection by appearing. That a rule to plead was dispensed with in all cases by the fourth rule in Easter Term last; but that the judgment was prematurely signed, as the defendant had till Monday to plead, for the plaintiff was not bound by the particulars voluntarily delivered on the Friday (Peake's N. P. C. 229; 1 Taunt. 353), especially as by delivering other particulars when the order was served he shewed he did not rest on the first. If the plaintiff could have signed judgment on the Monday at all, he certainly could not do so till the closing of the office; but as the objection was one of very strict practice, and as an application to set aside this interlocutory judgment might have been made before a judge in chambers, before the assizes, whereby the plaintiff might still have gone to trial, they refused to give the defendant his costs.

Per Curiam.—Rule absolute.

Vide 13 Ea. 508; 3 B. & P. 319; 2 N. R. 361; 2 Moore 655; 4 T. R. 557.

CHISHOLM v. WARD AND TERRY.

When the plaintiff, in his affidavit of debt, swore that two persons, trading under the name and firm of T. & Co., were indebted to him, and sued out process against one only, the other being at the same time within the jurisdiction of the court, the arrest was set aside for irregularity.

The affidavit of debt in this cause stated that Ward and Terry, trading under the name and firm of Terry & Co., were indebted to the plaintiff in £——, &c., and that plaintiff was apprehensive Ward would leave the province, &c. A *ca. re.* was issued against Ward alone, who was arrested and held to bail. No proceedings were taken against Terry.

Draper moved to set aside these proceedings for irregularity, and to order the bail bond to be delivered up to be cancelled, producing an affidavit that Terry was living within the jurisdiction of the court at the time the suit was commenced, and might have either been served with process or held to bail. Barn. 70; 6 T. R. 688; 15 Ea. 159.

The *Solicitor-General* shewed cause. 1 Bing. 48, 68.

The court all agreed that the writ was irregular and should be set aside, and MACAULAY, J., added, he considered the process here a part of the suit—a step in the cause; and that it should therefore contain the names of all the defendants. As to costs, SHERWOOD, J., thought this case stood on the same footing with any other irregularity, and that the rule should be made absolute with costs, but on terms of bringing no action.

The CHIEF JUSTICE and MACAULAY, J., held that

as this was a summary interference of the court to relieve defendant, and made for his benefit, costs should not be allowed.

Per Curiam.—Rule absolute.

See 4 M. & S. 360 ; 1 Chit. rep. 282 ; 1 T. R. 782 ; 1 B. & P. 481 ; 2 B. & P. 109 ; 1 Marsh. 477.

MACANADY V. FOSTER, ONE, &c.

Where a bill is filed against an attorney in vacation, he has till the next term to plead, notwithstanding the rule of this court dispensing with imparlances.

Spragge obtained a rule *nisi* on a former day to set aside the proceedings in this case for irregularity. A bill had been filed against the defendant, an attorney, in vacation, and a copy thereof with a demand of plea were served at the same time. Eight days after such service the plaintiff signed judgment by default.

Baldwin shewed cause.

CHIEF JUSTICE.—If this is regular, then attorneys instead of having privilege may be more rigidly proceeded against than other defendants. Process must be returnable in term, and no defendant therefore could upon a writ sued out in vacation have judgment signed against him before the next term. Here this bill is in the place of process, but surely the defendant must have a day in bank without craving an imparlance. The case in Doug. 312, and the note thereto, confirms that view of it, and that you

can go no farther in vacation. By the general practice of the court, I conceive nothing can be done on a bill filed in vacation till the next term. The error, it seems to me, is in demanding the plea before the term, the bill being in the nature of process.

SHERWOOD, J., concurred.

MACAULAY, J., differed, thinking the rule of court included all cases, and applied as well to attorneys as other defendants.

Per Curiam.—Rule absolute without costs.

IVES V. HITCHCOCK.

After a demurrer had been decided against the plaintiff, which admitted the facts which had been found by the jury on a trial of the issues joined. The court refused a new trial, which was moved for on the alleged ground that the verdict was against evidence.

The pleadings in this cause are stated in the report of the judgment of the court upon the demurrer. (Ante p. 259.) After that the *Solicitor-General* moved for a new trial on the ground that the verdict was against the evidence of the fence viewers, appointed according to law, who stated the sufficiency of the defendant's fences; which evidence being given by persons appointed by law for the purpose of determining the sufficiency of the defendant's fences, he contended was conclusive.

Draper objected, that this very question was expressly raised by the plaintiff's replication to the third and fourth pleas, which had been determined against him.

CHIEF JUSTICE.—Upon looking more particularly into the point I am confirmed in the opinion that the principle that a demurrer admits all facts well pleaded has such an application in this case as would render it repugnant to grant a new trial on the ground on which it is prayed. The defendant does not deny that the plaintiff's recovery at the trial was supported by the evidence, so far as it respected taking the horses, but he contends that he gave sufficient evidence to the jury that the horses were doing damage at the time he seized them in his close, and that "that close was surrounded with a lawful fence, as the statute of the province requires." That they were doing damage to the defendant was not a point questioned in the evidence, nor is it pretended that upon that point there was any conflicting evidence, or that the jury in that respect committed any error; but the defendant urges that the jury went against the weight of evidence in this respect, namely, that they came to the conclusion that his, the defendant's fence, was not a sufficient fence under the statute so as to entitle him to distrain cattle damage feasant, whereas he conceived he proved by the best and most conclusive evidence that the fence was lawful and sufficient, and because the verdict was on that ground against evidence he prays a new trial. Without considering at present whether this finding of the jury is so well founded that the court in ordinary circumstances would grant a new trial, it is to be seen whether the defendant is not precluded by his own admission from denying this very fact on which he wishes to take the verdict of another jury. He has pleaded the general issue, and three

special pleas; the plaintiff has replied specially to all the special pleas; and in all his replications he avers that the defendant's fences were not of sufficient height, and were ruinous, broken down, and in great decay. The defendant takes issue on this averment in his rejoinder to the replication to his first special plea: his fences, he says, were of the proper legal height, and were not ruinous, prostrate, and in decay, and upon this the parties are at issue. To the third and fourth replications he demurs generally, and therefore *quoad* those pleadings, at all events, he admits that his fences were insufficient and ruinous, that is, he admits all the facts stated in those replications demurred to provided they are well pleaded. The plaintiff has judgment on the demurrer, and therefore the facts are adjudged to be well pleaded; and it follows that *quoad* the third and fourth replications the fact in question is conclusively admitted. Can the defendant now call in question before a jury on the trial of the general issue, and of the issue upon the first special justification, the very fact that he has admitted upon the record by demurrer to the two subsequent replications?

I have been perplexed by considering that at *nisi prius* the ordinary practice undoubtedly is to try the general issue, and any one or more special issues, quite independently and upon their own merits, as made out in evidence, without regard to anything the defendant may be said to have admitted in any other special plea, whether that plea is followed by an issue of fact or of law upon the record; but I think this does not affect the present

question, because at *nisi prius* it would certainly be out of the sphere of duty of the judge to determine whether the demurrer to any other pleading is well or ill founded; that waits the judgment of the court, and until that judgment is given it cannot be said that the facts in the plea demurred to are well pleaded, and consequently, whether the defendant can be held to have admitted them or not. Again, if the special pleas have not terminated in demurrers, but in issues of fact, it would seem unjust to take such parts of them merely as make against the defendant to be admitted, without admitting also the justification to which they are only introductory, that is, the motives and purposes for which the defendant alleges he did the act. In either case there seems good reason, while all are depending and before the judge at *nisi prius*, why the jury cannot mix the issues and take as proof of the one the admissions of the other. The parties are now before us under different circumstances. The case of *Broadbent v. Wilks*, in *Barnes* 266, though short, is expressly in point, to shew that the defendant cannot now dispute the insufficiency of the fences, having demurred to a replication averring that fact, and that demurrer having been determined against him and in favour of the replication. But it is said *Barnes* is an authority not to be trusted; his notes of points are short and often unsatisfactory, and I am aware they have been frequently found to be incorrect. On the other hand, many decisions of the court will be found to rest mainly upon the authority of some case reported by *Barnes*, especially on points of practice. He was (though he may

not have been a profound lawyer) long secondary of the court, and this is precisely one of those points on which an error on his part would be least excusable and least probable; nor would it be likely, one would think, to stand without correction in the several editions of his book—besides, I find nothing to contradict it in any other case. That same case is reported in Willes, Wilson, and Strange. Wilson and Strange report it chiefly for the other point involved in it, as to the legality of a custom stated in the pleadings, but they notice also the point of practice stated by Barnes, unless we are to infer from their silence that the general issue was not pleaded in the action, as Barnes says it was. We ought not to infer that because they do not profess to give the pleadings entire, or to recapitulate them—but Willes 364 does, and a report of higher authority cannot be, because he delivered, in the name of the court, the very judgment which he reports; he states the pleadings precisely, and fully confirms Barnes. Not guilty was pleaded to the second count, and a special justification to the first, and the issue was found for him; but inasmuch as the justification to the second count was found to be no justification, and the defendant had in that justification admitted the trespass which thus stood not justified, the court gave judgment against him, notwithstanding the judgment which he had obtained upon the issue. This case clearly shews, I think, that when the defendant is concluded upon a point that goes to the whole action upon any pleading, he cannot treat that as a point still open on which he may have a verdict and judgment on another issue.

The first count here is special trespass, for seizing plaintiff's cattle depasturing in a close, driving them to the pound, selling them, and converting the money to defendant's use. The evidence we must look into on this application for a new trial, as it turns on the evidence. Then we see that all the evidence, in fact, related to one act of trespass, and tended to prove the first or special count. We could not grant a new trial to allow the plaintiff to go into a second trespass under the second count. Then, in the pleadings to the first count, it stands admitted by defendant's demurrer to the replication to one of the pleas to that count, that the fences were defective. The fact, therefore, is established *quoad* that count, for by judgment on the demurrer the facts are found to have been well pleaded. I have had so much difficulty in coming to a satisfactory opinion on this point of practice, that if it were the only matter to be considered I should even yet hesitate to look upon the defendant as absolutely concluded from going to trial upon the issues; but the truth is, he has already gone before a jury upon it, and upon full hearing and the testimony of many witnesses on both sides, the jury have found against him upon the express fact of the sufficiency of the fences. Now, admitting the evidence to have been questionable or doubtful, I certainly would not direct a new trial in order to try a second time, as disputed, a fact that he has admitted on record.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Curiam.—Rule discharged.

VAREY V. MUIRHEAD.

Covenant for title. Breach, want of seisin, and an eviction by B. alleged in the declaration. Plea, seisin in fee. *Held* that upon proof of eviction by B. it was incumbent on defendant to prove seisin without proof of title in B. by plaintiff, as though averred in the declaration it was not denied, except indirectly by defendant's plea of seisin, in himself; at all events that defendant going into evidence of his title cured the objection. That a judgment on *sci. fa.* against B., the heir of the deceased owner of the land, and a *fi. fa.* thereon awarding the sale of lands, of which the party deceased was seised on a specified day, previous to which he died, could not sustain a purchase, and that a sheriff's deed under such judgment and *fi. fa.* could give no title. *Quære*, Whether in order to sell the lands of a deceased debtor against whom judgment was obtained in his lifetime, the proceedings should, under 5 Geo. II., ch. 7, be against his heir or personal representative.

Covenant. The declaration alleged, that by indenture the defendant in consideration of £112, 10s. did grant, &c., to plaintiff, his heirs and assigns, for ever, lot No. 110, in the town of Niagara, with a covenant that defendant then was the true, lawful, and rightful owner of the said lot, and then was lawfully and rightfully seised in his own right of a good, sure, perfect, absolute, and indefeasible estate of inheritance, in fee simple, of and in the said land, without any limitation of use or uses or any other matter or thing to alter, charge, change, incumber, or defeat the same. Breach protesting that defendant hath not kept, &c., that defendant was not the true, lawful, and rightful owner, &c., and was not lawfully or rightfully seised, &c. 2nd count.—Similar to the first down to the breach, that defendant was not lawfully or rightfully seised, &c., by reason whereof plaintiff hath not been able to have and to hold the said premises to him, his heirs, and assigns for ever; but one J. M. had lawful right and title, and was seised as in fee of the said premises, and did enter into the same and ejected the plaintiff by due process of law, by reason whereof the plaintiff hath not only lost the premises and divers large sums

of money, to wit, £500 laid out by him in and upon the said premises, in repairing and improving the same, but hath been obliged to pay the costs expended by the said J. M. in prosecuting his ejectment, and hath undergone costs in endeavouring to defend the same, to plaintiff's damage, &c.

Pleas.—1st. After oyer, *non est factum*. 2nd, to the first count.—That defendant at the time of making the indenture was the true, lawful, and rightful owner, &c. 3rd, to the first count.—That defendant at the time of making the indenture was lawfully and rightfully seised, &c. Similar pleas to the second count.

At the trial of the last Niagara assizes, *cor. Sherwood*, J., the plaintiff proved the execution of the deed, and then proceeded to shew that an action of ejectment had before that time been brought against him by one J. M., who recovered and turned him out of possession. He then proved his damages, the price of the land and interest, the value of improvements erected by him, and the costs he had paid on the defence was proved a judgment in this court of Trinity Term 1820, entered on a cognovit against one C. M. in favour of defendant. In the margin of the roll there was an entry made and signed by the clerk of the Crown, shewing that the judgment was in fact entered on the 11th December 1820. The defendant also gave in evidence a *sci. fa.* roll. The writ of *sci. fa.* contained an allegation of the death of C. M., stating the exact time he died, and also alleged that a writ of *fi. fa.* against the goods of C. M. had issued and been returned in part satisfied,

and that a writ of *fi. fa.* against the lands of C. M. had issued for the residue of the debt and costs, directed to the sheriff of the district of Niagara, who had returned thereon that C. M. had no lands in his district. The writ of *sci. fa.* further commands the sheriff to make known to J. M., heir at law of C. M., and to the tertenants of the lands whereof C. M. on the 11th December 1820, being the day on which judgment was given against him, was seised in fee simple, to shew cause on the first day of Trinity Term then next ensuing why the residue of the debt and costs recovered against C. M. should not be made of those lands. At the return of the *sci. fa.* the heir and tertenants made default, and judgment was given in favour of the present defendant that he should recover the residue of his debt and costs of the lands owned by C. M. on the 11th December 1820, upon which a writ of *fi. fa.* was awarded against the lands and tenements which were of C. M. on the 11th December 1820, and upon this writ the sheriff sold and conveyed the lands in question to the present defendant, who was plaintiff in the suit against C. M. The defendant sold the lands afterwards to the present plaintiff, and gave him the deed on which the action is brought. It appeared that C. M. died between the 15th and 20th November 1820. The plaintiff's counsel objected to the validity of the judgment against C. M., urging also that the *fi. fa.* against the lands was void, as on the 11th December C. M. had no lands. The defendant's counsel contended that no objection could legally be made at *nisi prius* to that judgment, and if it were defective at all, advantage could be taken of it by writ of error only. The judge ruled

that the plaintiff, being neither party nor privy, but a stranger to the judgment, might adduce evidence to shew it void *ab initio*, and a verdict was rendered for the plaintiff.

In Michaelmas Term last, *Draper* obtained a rule *nisi* to set aside the verdict on the ground that the parol evidence adduced to avoid the judgment ought not to have been received.

The *Solicitor-General* shewed cause.

Judgment was this day given; the CHIEF JUSTICE expressed no opinion, as he had been concerned in some of the proceedings when at the bar.

SHERWOOD, J.—I think the opinion I formed at the trial, that the plaintiff being neither party nor privy but a stranger to the judgment, might adduce parol evidence to shew it void *ab initio*, correct, and that it is supported by the principle established in 2 Mod. 308. It is true the judgment objected to in that case is avoided by special plea, but the doctrine advanced by the court is general and applicable to every mode of defence adopted by a stranger to the judgment. Many subsequent cases prove that a final judgment may be shewn to be void under the plea of the general issue.—T. Ray. 404; Cowp. 640. I thought at the trial that the judgment against C. M. was void, and I still incline to that opinion, but I have not made up my mind fully on that point, because it does not appear necessary to do so in the present case. Other obstacles to the defendant obtaining a new trial present themselves, upon which

there is no doubt. I will therefore briefly state the objections to the judgment which occurred to me. A judgment is uniformly entered of some term. By intendment of law a judgment entered during term or during the succeeding vacation has relation back to the first day of the term. The present judgment was entered in the vacation after Michaelmas Term, and consequently its legal relation extends back to the first day of Michaelmas Term, but no further.—1 Wils. 39, 7 T. R. 21, Willes 427.—The judgment, however, was entered as of a term before Michaelmas Term, and the roll is entitled of Trinity Term, and therefore the record itself shews it cannot be a judgment of Michaelmas Term. Now, it appears to me a judgment entered on a cognovit or warrant of attorney in vacation after the death of the defendant cannot be considered as entered of his lifetime without the aid of legal intendment already mentioned; and as the record itself clearly proves the judgment to be entered of a term not within the scope or protection of this legal fiction, it necessarily follows, as I am inclined to think, that it is no judgment at all in the technical sense of the word. I am not aware of any established intendment of law by which it can be supported. It might be urged that this court, upon a proper application, would order the record to be amended by entering the judgment of Michaelmas Term, but as such a step is never a matter of course, after the term in which the judgment is entered, it must be more problematical after a lapse of ten years, as in this case. I give no opinion, however, on the subject of amendment; all I wish to intimate is that you consider it a matter of course for the purpose of supporting the judgment.

It appeared in evidence on the trial by the *sci. fa.* roll and the proceedings thereon that a writ of *fi. fa.* for the residue of the debt and costs was awarded against the lands and tenements which were of C. M. on the 11th December 1820, a day which was after his death. The *fi. fa.* itself was not produced at the trial, but the deed from the defendant to the sheriff was, and it contained a recital of the execution, shewing it to have issued in the same form in which it was awarded on the roll. Now, it appears to me the award of the execution and the writ itself were void. Whether either could be amended or not is altogether another question. The sheriff was commanded to sell the lands which C. M. owned on the 11th December 1820. The authority of the sheriff to sell was consequently limited to a description of lands which had no existence; in fact C. M. was dead, and owned no lands on or after that day. The plaintiff in that action chose to sue out an unusual kind of writ, and I think the sheriff was bound by the special terms of it, and could not sell the lands which had then descended and become the property of J. M., the heir at law, even if they had been liable to be sold under the proceedings under the *sci. fa.* I am also inclined to think the proceedings under the *sci. fa.* were insufficient to warrant the issuing of a writ of *elegit* for the purpose of extending a moiety of the lands descended to the heir, if the plaintiff in that action had been inclined to collect his debt according to the course in England. If he were desirous of obtaining his end in that way, he should, in my opinion, first sue out a *sci. fa.* against the personal representative, and upon the return of *nihil* against the executor or administrator

he might then have recourse against the heir and tenants, but not before.—Carth. 107.

In this instance the plaintiff did not elect to take his remedy according to the English law, but proceeded, under the statute 5 Geo. II., to sell the land itself. I have already said I thought the terms of the execution made the writ void, but if it were in other respects unobjectionable I think it could not be sustained as a legal proceeding under that act. I consider the remedy given by that statute against the lands to be exactly like the remedy given by the laws of this province against the goods. The latter part of the 4th sec. appears to me to contain the enactment in so many words: the first part makes real estates in the British plantations in America liable to and chargeable with all just debts, dues, and demands, of what nature or kind soever, and the latter part expressly enacts that they shall be subject to the like remedies, proceedings, and process for seizing and selling the same, and in like manner as personal estates are seized and sold for the satisfaction of debts in any of the plantations respectively. When the parties in a suit are changed by the death of a defendant, after the entry of final judgment, before the plaintiff can proceed he must sue out a *sci. fa.* against the personal representative of the defendant. If he follows the words of the statute he must also proceed in like manner before he can sell the lands. The writ of *fi. fa.* against the lands in this suit issued more than twelve months after the entry of final judgment, and after the death of the defendant so that the case in that part is precisely parallel to the one I have before stated respecting the goods.

Now, as the 5 Geo. II. clearly designates the remedy which the creditor shall have against the real estate of his debtor, it might be sufficient to say that in the present case the remedy mentioned in the act has not been pursued; but I am inclined to go further and endeavour to shew that the legislature could never have intended to pass by the personal representative altogether, and allow such a remedy as has been attempted in this case: such a deviation from the plain and obvious terms of the law would produce delay to the creditor and injustice to the debtor in many instances. According to the law of England the tertenants are not to be charged on a judgment till the heir is summoned, or it be returned that there is no heir, or that the heir has no lands to be charged; for the heir may have a release to plead or other matter to bar the execution.—6 Bac. Abr. 114. If the heir be a male and under age the parol may demur till he is of age, and if the land descend to several females the parol may demur during the minority of any of the co-parceners.—Rol. Abr. 140; C. Lit. 290, a; 2 Salk. 598. If any one of the co-parceners should die, and the share of the deceased descend to several females, the embarrassment and difficulty of the creditor would be greatly increased; and the residence of the heir in a foreign country, when his lands in this province are entirely unoccupied, presents an obstacle altogether insurmountable. On the other hand, the heir himself might be injured if no *sci. fa.* should issue against the personal representative. There are many just and legal pleas which the executor might readily make and effectually sustain for the benefit of the heir, because the facts and proofs would be peculiarly within his own

knowledge and power, but which the heir might not be able to make for want of information, or if he could make them, he might find it extremely difficult or perhaps altogether impossible to prove. For instance, a release to the testator himself or to the executor; payment of the judgment by the testator or executor; or that goods and chattels of the testator, in his lifetime, sufficient to satisfy the judgment, had been seized in execution.

I am of opinion that all these and many other similar obstacles to the attainment of justice by creditors as well as debtors might be surmounted by following the simple and well-known remedy against the personal property in all proceedings for the sale of real estate. The statute, in my opinion, directs this course, and the interests of society seem to require it. I am quite aware the cases I have cited to shew a *sci. fa.* according to the law of England should issue against the personal representative before recourse can be had to the heir and tertenants, may be met by the case in Dyer 208, in support of the contrary opinion. That case, however, was reported more than a century before the one in Carthew; and the reporter himself seems to have doubted its accuracy by subjoining a quere at the conclusion. Bacon, Tidd, and Bingham evidently consider the case obsolete, because they take no notice of it in their treatises on issuing the writ of *sci. fa.*, where the parties are changed by the death of the defendant of the entry of final judgment. I am inclined upon the whole to think that whether the defendant had in this case been desirous of extending one moiety of

the real estate by the writ of *elegit*, or of selling the whole by writ of *fi. fa.* the proceedings on the *sci. fa.* would be insufficient to sustain him. I think no legal sale of the premises in question has yet been had, and am therefore of opinion a new trial ought not to be granted.

MACAULAY, J.—The first question relates to the sufficiency of the plaintiff's *prima facie* proof of the defendant's breach of covenant, which consisted in shewing that the plaintiff had, since the conveyance and covenant made, been ejected by the heir-at-law of C. M. upon the usual demise, &c. Independent of the consideration that title in J. M. and eviction are alleged in the second count of the declaration, and only denied indirectly by assertion of title in defendant, on whom lies the affirmation of the issue, this objection seems obviated by the evidence of title adduced by the defendant giving rise to several other points, the result of which must establish whether the covenant was broken or not. It appears the defendant's judgment against C. M. was actually entered on the 11th December 1820, in Michaelmas vacation of that year—a day subsequent to his death. The roll being entitled of Trinity Term preceding and no continuance is entered, the first question is to what day such judgment relates, the said C. M. having died in Michaelmas vacation, but previous to the entry, as against purchasers, judgments relate only to the actual entry and docket.—29 Car. 2, ch. 3, and 3 & 4 W. & M., ch. 14. By purchasers are meant purchasers independent of the judgment, not those buying at sheriff's sale and claiming under it. But between the parties

and their privies judgments relate to the first day of term in or of which they are entered, as I think is fully shewn in the following authorities:—Willes 135, 437; 6 T. R. 368; 7 T. R. 20; 7 Ea. 297; 1 B. & P. 571; 5 Bing. 1; 3 P. Wms. 399. And a mere irregularity in the proceedings cannot be urged at *nisi prius*.—4 Camp. 58; 4 Price, 13. I therefore think that the present judgment must be taken to relate to the first day of Michaelmas Term, at latest (when C. M. was living), if not of Trinity Term, in the absence of a continuance which, if important, might now be entered by leave of the court. And as the plaintiff and defendant claim title under the judgment, such relation applies to them equally with C. M. and his heirs. The judgment subsists as of the first day of the term, and proof of the defendant's death in the ensuing vacation cannot invalidate it. Owing to the relation of the judgment, the *fi. fa.* against goods tested in the lifetime, ss. the last day of Michaelmas Term appears to me to have issued regularly. I, however, do not conceive its regularity important. If it were, I must sustain the writ. Although our provincial statute declares that the same process shall not include lands and goods, and that a writ against the latter shall precede that against the former, still the language of the legislature being directory and not restrictive, I am by no means inclined to think that the validity of a sale of lands depends upon a compliance with the act in this respect. A failure to observe them might induce the court, upon application, to set aside the execution against the lands previous to a sale, but when acted upon, it could not, I apprehend, be treated as void, and

that no relief could be afforded to the prejudice of a *bona fide* purchaser, unless under peculiar circumstances, still less could the whole proceeding be treated as nugatory at *nisi prius*. If, therefore, the sale of lands on the present occasion could be sustained on all other grounds, I should not think the want of a return of *nulla bona* against the personal representatives of the said C. M., in addition to the return of the writ that went against his chattels, tested in his lifetime, but executed after his death, a valid objection to destroy the defendant's title. The plaintiff seeks to impugn the legality of the sale on other grounds; and it is objected that he cannot avail himself at *nisi prius* of the exceptions urged, but as he is a stranger to the proceedings, and incompetent to impugn them by direct application, I think he may.—2 Mod. 308; Salk. 600; Gil. Eq. rep. 220; 4 M. & S. 20; Carth. 107; 2 Saund. 72; 4 Campb. 58; 4 Price 13; 1 B. & A. 40; 3 Taunt. 543.

The main objections are twofold. 1st, That the judgment with a view to lands is revived by *sci. fa.* against the heir and ter tenants, instead of the personal representatives, through whom alone it is contended, the lands could be sold, however liable to *elegit* or extent by the course pursued.

2nd, That the judgment on *sci. fa.* even if sustainable, is special, to levy the residue of the debt of the lands of which C. M. was seised on the 11th December 1820, a day subsequent to his death.

The first point involves the important enquiry, by what course of proceeding lands may be sold as

assets for the satisfaction of debts. But the opinion I have formed supersedes the necessity of pronouncing any decision of the general question. I would remark that the judgment recovered by the defendant against C. M., though in debt upon bond, can have no greater or other effect than a judgment on simple contract. It does not appear on the record whether the obligation bound the heir or not, and if it did, the security being merged in the judgment would exonerate him; that is, he would be no further bound or liable than under a similar recovery in assumpsit. So that this case would have presented nothing peculiar had it been the duty of the court to decide the proper judicial course to be pursued in enforcing a sale of the lands of a party dying indebted, against whom a judgment had been obtained in his lifetime, and remained unsatisfied at his death. The judgment relating to a time antecedent to the death of C. M., I deem it competent to the present defendant to sell the lands of which he was seised on the day of his death, if not, upon the day to which the judgment has relation; and the *sci. fa.*, if in other respects regular and effectual, should have fixed the remedy to one of those periods, instead of which it recites the judgment as entered on 11th December 1820, and that C. M. died after such judgment, and then commands the citation of the heir and tertenants to shew cause why the sum should not be revived against them, and the plaintiff in that suit have execution for the residue of his debt, to be levied of the lands whereof C. M. on the 11th December 1820, or ever after, was seised in fee. Upon the return of the service, and the default of the heir, the plaintiff recovered on the *sci. fa.*

accordingly, to have execution for such residue, of the lands of C. M. deceased, on the 11th December 1820, the day of the aforesaid judgment. A *fi. fa.* conforming to the judgment of *sci. fa.* issued under which the lands in question were sold. It now turns out that C. M. was dead before the 11th December, and therefore could not have been seised of any lands on that day or afterwards. The judgment specifies no lands in particular, and the facts do not seem to warrant the sale of any real estate whatever.—Plow. 441. The defendant, therefore, would fail on this ground, and independent of the ulterior considerations.

Whether admitting the propriety of the proceedings adopted, the court could amend the *sci. fa.* judgment and execution, so as to obviate the peculiar objection, it is unnecessary to enquire—(6 T. R. 1; 2 B. & P. 275; 9 Ea. 316)—but as the interests of third persons might be materially affected obvious difficulties present themselves. It is to be lamented that the doubts and conflicting opinions entertained as to the construction, 5 Geo. II., should entail embarrassment upon suitors, and the present is perhaps an instance. Every case that arises will probably more and more evince how desirable it is that the legislature should interpose to modify and regulate the bearing and application of the statute. In the meantime the court can only dispose of questions that occur, as the law in its subsisting shape shall seem to warrant and require.

It was intimated by the court that there was another point which had not been spoken to, and upon

which they felt some difficulty, namely, the general damages which had been given—including as well the price paid for the land as money expended upon improvements, &c., and *Draper* then moved to enlarge the rule till next term, in order to argue this point, which the court, after some hesitation,

Granted.

FALLS ET AL. v. LEWIS.

The plaintiff recovered a verdict within the jurisdiction of the district court, and as soon as the verdict had been recorded the court adjourned. *Held* that the plaintiff's counsel was too late in moving for a certificate to carry costs at the opening of the court next day.

TROVER.—At the last assizes for the Home District the plaintiff obtained a verdict for £15. Immediately after the trial the court adjourned, when at the opening of the court on the following morning the plaintiff's counsel applied for and obtained a certificate to entitle him to King's Bench costs, under the statute 58 Geo. III., ch. —. The counsel for the defendant had leave to move to set aside this certificate, as the Chief Justice granted it subject to the opinion of the court as to its legality, and accordingly, on a former day, *Washburn* obtained a rule *nisi* to set aside the certificate on the ground that it was moved for and obtained too late. The statute provides that in a suit brought in the King's Bench, which is of the proper competence of the district court, no more costs shall be taxed against the defendant than would have been taxed in the district court in the same action, unless the judge who tried the cause shall certify *in open court at the trial* that it was a fit cause to be withdrawn from the district

court, and commenced in the King's Bench. The *Attorney-General* shewed cause—cited 2 B. & C. 580, 621 ; 3 Camp. N. P. C. 316.

The CHIEF JUSTICE and MACAULAY, J., held that the application for the certificate was too late. They considered the expression “at the trial” as pointing out distinctly the time when such certificate must be moved for; and if the plaintiff should omit moving for it in due time, this court could not aid him by giving a construction to the statute calculated to change its terms and meaning.—2 Wills. 21 ; 7 T. R. 448 ; 6 Ea. 586, 7 ; 4 D. & R. 147.

SHERWOOD, J., differed.—In my opinion every act of parliament should receive such an exposition as would effectuate the evident intention of the legislature, which intention must be ascertained from the subject-matter and the context of the statute. Now, it appears to me self-evident that the trial must be finished and the verdict of the jury recorded before the judge can properly certify; because he should be properly acquainted with all the circumstances of the case to enable him to certify correctly, and he must know the amount of the verdict before he can ultimately determine whether in fact a certificate is necessary. There is another consideration which inclines me to think that the legislature never intended the words “at the trial” to denote the very identical time the trial was in progress. Doubtful expressions are often explained by antecedents or subsequent phrases, or by both, and in this statute I think the words immediately preceding tend very much to define what the legislature meant by the

words "at the trial"—I allude to the words "in open court." If the words "at the trial" must necessarily be construed to mean the *time* of the trial, then there could have been no necessity for the words "in open court"—because everybody knows the court must be open when the trial is going on. The words "at the trial," therefore, cannot, consistently with the intention of the legislature, be read according to strict grammatical construction, and the certificate, from the necessity of the case, must be granted after the trial. This, in my opinion, is the sound construction of the act, and agrees with the principle so far as relates to the granting the certificate *after* and not *during* the trial, established in 4 D. & R. 147, 156.

If it be conceded, therefore, that the certificate must be granted after the trial, it seems to me to relieve the case from all embarrassment; because I think it impossible to assign a good reason for saying the judge must grant it immediately after the trial, when the statute itself does not expressly require it. When an act leaves anything to be done according to the discretion of a judge, I think it but reasonable to intend the legislature meant he should be allowed a convenient and sufficient time for consideration of the subject, in order that his discretion might be properly exercised. There is a substantial reason for saying the certificate should be granted in open court, because the defendant should have an opportunity of objecting; the legislature have accordingly enacted it to be done in that manner. In my opinion the words "at the trial" were intended to designate the court at which the trial was had,

and as the certificate was granted at *nisi prius*, when the cause was tried in open court, I think it is valid and should be sustained, particularly as the facts of the case leave no doubt that the plaintiff was justly entitled to it.

Per Curiam (Diss. SHERWOOD, J.) Rule absolute. (a)

IN RE SHERIFF OF NEWCASTLE.

Sale of lands under the assessment law (for non-payment of taxes) on 1st March 1830. On 1st March 1831, the treasurer being absent from the district, payment of the purchase money and 20 per cent. interest was made to the deputy sheriff, who was in the habit of receiving taxes for the treasurer. The court refused a mandamus directing the sheriff to convey the lands to the purchaser at the sale.

Boulton, G. S., moved for a *mandamus nisi* to the sheriff of the Newcastle district, to execute a conveyance of certain lands sold by him, according to the statute, for non-payment of rates. The sale took place on the 1st March 1830. On the 1st March 1831 the amount of the purchase money, and 20 per cent. on it, was paid to the deputy sheriff, who frequently acted for the treasurer in receiving taxes. The treasurer himself was absent from the district, and did not return for some time afterwards. The sheriff refused to convey the land to the purchaser, on the ground that the money was not paid in due time. *Boulton* contended that the time for payment expired on the last day of February, and that the payment to the sheriff was a mere nullity, the statute requiring it should be made to the treasurer.—1 M. & S. 32; 2 M. & S. 80.

(a) See *Mahoney v. Zwick*, 4 Old Series, 99; *McKee v. Irwine*, 1 U. C. Q. B. 160; *Malloch v. Johnston*, 4 U. C. Q. B. 352; *Handcock v. Bethune*, 2 U. C. Q. B. 386.

CHIEF JUSTICE.—In the first place, as to the time allowed for redemption, the words of the statute are “within twelve calendar months from the time of such sale.” The sale was on the 1st March 1830. If no fraction of a day is to be reckoned, as we must begin to compute *from*, that is after the sale, then the reckoning must be begun on the 2nd March, and the twelve months would not expire before the night of the 1st March at all events. However, it is not an inflexible rule that the fraction of a day should not be reckoned. For the purposes of justice the court will divide a day or an hour, and it is not shewn that twelve calendar months had expired upon that minute calculation. To save a forfeiture, if in any case, the court would give a party the benefit of every moment of time. But I think this question not worthy of much consideration in the present instance, because certainly the court would not interfere by granting a *mandamus*, if the question were only whether the taxes had been paid a day too late to save the forfeiture. The strict letter of the law may leave the sheriff no power to shew indulgence, and the purchaser may be so rigid as to authorise none; but in that case I think the court would be satisfied to leave all parties to the effect of the ordinary legal remedies.

Here another question is raised. The payment, it is said, was made not to the treasurer but to the deputy sheriff, which I look upon as if it had been made to the sheriff. It is admitted that about the time the twelve months expired the treasurer was absent from his district, and that the sheriff and his deputy were in the habit of receiving taxes from

others. The act certainly says that if at the expiration of twelve calendar months from the sale the land shall not be redeemed by the proprietor of the lot, or some one on his behalf, paying to the treasurer of the district the amount levied, the cost of such levy and 20 per cent. in addition, the sheriff shall, on demand, execute a conveyance. I see nothing whatever in this part of the case to warrant an interposition by *mandamus*. What is it to the purchaser to which public officer the money be paid? The sheriff is an officer who by the statute has a great deal to do in carrying its provisions into effect. He knows the amount levied, and better than anyone else the expense of the levy, and therefore can have no doubt as to the amount to be received. To be sure, a payment to him instead of the treasurer is informal, but when the treasurer was out of the district, and other persons were in the habit of leaving with the sheriff the money necessary to redeem—what so natural as for the proprietor of the land in this case to take his money to the sheriff, and say—"I am anxious to redeem my land—the treasurer is not here; to prevent all risk I leave it with you. It is you alone who can make the deed to the purchaser, and of course you will not do so after receiving the whole amount from me necessary to redeem my lot." It is not negatived that the sheriff may have been authorised by the treasurer to receive moneys for him in his absence, and the court should not infer it, and grant a *mandamus* on such an inference. It may be paid to the treasurer through the sheriff, as well as immediately to himself; and certainly the sheriff, knowing all the facts and receiving the money himself, would act a most

unjust part if he did not as much as possible endeavour to prevent the hardship of the proprietor losing his estate by an informality of this kind, to which a public officer was party, and of which he might in fact be justly charged with being the principal occasion; for it was his duty, as he took the money under these circumstances, to have paid it immediately to the treasurer. It may be said that from the payment not being made to the treasurer, the purchaser finding upon enquiry there at the end of the twelve months that it stood as unredeemed, may have felt himself safe in commencing improvements, and that he is injured if he afterwards loses his land so improved, in consequence of a payment having been made within the period to an officer who had no right to receive it. That is true; and there may be cases where the irregularity is so clearly intentional and inexcusable on the one hand, and the hardship so great on the other, that this court might feel inclined to use any power they possess for giving to the purchaser the benefit of his legal right. This, however, does not stand before us in any respect as one of those cases, and at all events for any such damage the party would have a legal remedy, which in such a case as the present I think quite sufficient. It is alleged that the payment here was made by a person not privy to the estate, nor having any authority or consent from the proprietor to make the payment, and that it has been made officiously and in order to prevent the purchase at sheriff's sale from taking effect, which purpose, it is said, was made for the express purpose of confirming a title in the purchaser which before was equitable, but which was

subject to some legal doubt or difficulty. If the latter statement is correct, it quite justifies the party making this application in desiring to urge what he claims as a legal right to the utmost, and it relieves him from the appearance of acting harshly towards the former proprietor of the land. I thought at first the court might be a good deal influenced by this in extending the desired remedy, but on consideration I do not think we can safely or properly give any weight to it. The single object of the legislature in authorising the sale was to insure the payment of the tax. In that point of view it is of no more moment to the state who pays it, than it is to the creditors of insolvent debtors who sometimes receive their debts from the pockets of charitable individuals, whose only motive is to relieve against the miseries of a gaol. To the purchaser, however, at the sheriff's sale I can easily conceive it may be a grievance that his object in confirming a previously equitable title should be frustrated by the interposition of a stranger, or perhaps of some person who interferes from mere ill-will, or from a desire to give effect to some contrivance against the justice of the title. But if we look beyond the mere fact of the tax being paid, and interfere from a desire to protect or defeat any alleged claim of an individual, we may soon find that we have been doing great injustice when we meant only to prevent it. We shall be trying causes without the proper means and without the proper authority. I do not think, therefore, that we can enter into the views of the applicants in this instance, however just they may be.

As to the general question—the right to grant a

mandamus to the sheriff in a case of this kind—My present inclination is in favour of the right where the refusal of the sheriff to do his duty is such as to give rise to no question but that he wilfully disregards the provisions of the statute. If such an interposition can be maintained, it must be upon the footing that it concerns the court to see that an individual who can have no other specific relief is not deprived of its legal right from the wilful disobedience of a public officer to the direct provisions of an act of parliament. I think, however, that this general question affords much room for argument, on the ground that the subject-matter is a mere private right.

SHERWOOD, J., and MACAULAY, J., agreed that this was not a proper case for granting a *mandamus*.

Per Curiam.—*Mandamus* refused.

BERGIN v. WHITEHEAD.

Rule for judgment as in case of a nonsuit having been discharged on a peremptory undertaking, and payment of costs—the court on affidavit that the costs were not paid made the original rule absolute in the first instance.

A rule for judgment, as in case of a nonsuit, having been discharged on a peremptory undertaking to go to trial, and payment of costs, during last term, the court were now moved to make the first rule absolute, on an affidavit that the costs were unpaid. This was opposed on the ground that the costs had not been demanded of the plaintiff.

The court said, that it rested with the plaintiff to get the costs taxed, by making an appointment, as in

cases of new trials, 2 Arch. pr. 228, and demand on the plaintiff was unnecessary—as it was his business to get them taxed and pay them, and that a personal demand was only necessary when the object was to attach for non-payment. If the plaintiff resided in another country that part of the rule would become nugatory if a personal service were necessary. How rigid the court is in enforcing the condition appears from 13 Ea. 186—where the plaintiff, who had been nonsuited and obtained a new trial on payment of costs, went to trial without paying them, had a verdict. The court set all aside, and made a rule that unless the costs were paid in ten days judgment of nonsuit should be entered up. As to making the rule for judgment (on account of the failure) absolute in the first instance—that is the practice where the failure is in not going to trial according to the peremptory undertaking—and the court saw no reason why the same consequence should not follow a failure in the other part of the condition (a)

Per Curiam.—Rule absolute.

The following form of a Writ of Dower was settled and approved by the court during this term—SHERWOOD, J., dissenting on the ground of want of authority in the court.

William the Fourth, &c., &c.

To the sheriff of

Greeting :

Command C. D. that justly and without delay he render to A. B., widow, who was the wife of E. B.,

(a) A new practice now obtains ; see Consol. Stats. U. C., ch. 22, sec. 227.

her reasonable dower, which falleth to her of the freehold which was of E. B. her late husband, in whereof she has nothing, as she says, and whereof she complains that the said C. D. doth forceth her, and unless he shall do so, then summon, by good summonses, that he be before us in our Court of King's Bench, at Toronto, on the day of Term, to show wherefore he has not done it, and have there the summonses and this writ. Witness (as in other writs issued from this court).

REGULÆ GENERALES.

It is ordered that in real actions generally a writ of summons may issue from this court corresponding with the form usual in England, and tested in the same manner as writs of *capias ad respondendum* issued from this court. The time of return to be conformable to the English practice in such cases.

It is ordered, that when by reason of any privilege the proceedings are not commenced by writ of *capias ad respondendum*, a demand of plea may be served at any time when by the practice in England a rule to plead might be served, and not before; and that the service of such demand of plea shall suffice, as in other cases, without the necessity of taking out any rule to plead.

(Statement of facts referred to *ante* 456.)

MAITLAND ET AL. V. SECORD.

DEBT on bond, dated 4th December 1822, conditioned to pay £1337 on the 4th December 1826. Pleas—after oyer, *solvit ad diem*, and *solvit post diem*—on which issue was taken. The following were the facts of the case:—The defendant and one E. S., co-partners and merchants in Upper Canada, were indebted to the plaintiffs, merchants in Montreal, in the sum of £1337, 18s. 5d. on the 31st March 1822. The plaintiffs instructed their agent to take a bond and mortgage for this debt, and the bond in suit was thereupon given. On the 31st March 1823 the plaintiffs rendered an account in which the first item on the debit side was the balance of £1337, 18s. 5d. Sundry debits and credits were contained in this account, and the balance struck at the foot of it as due the plaintiffs was £1643, 4s. Accounts were rendered to the defendant yearly afterwards down to the 31st March 1826—carrying forward this balance of £1643, 4s. Divers debits and credits were entered in such account—the balance in favour of the plaintiffs increasing at each annual statement till the last, when it amounted to £3070, 6s. The defendant had also consigned some flour to plaintiffs to be shipped to Halifax, and the proceeds accounted for; and it did not appear to have been credited in their accounts. The jury found the value of this flour, with interest, to be £740. A verdict was taken for the plaintiff, subject to the following questions:—1st, Whether there was sufficient evidence to go to the jury to entitle the defendant to claim credit for this flour. 2nd, Whether the amount of such claim could be applied as a credit in favour of

the defendant, and given in evidence under either of these pleas. 3rd, Whether by reason of the partnership debt of defendant and E. S. being carried forward and incorporated in the accounts current between plaintiffs and defendant from March 1822 to March 1826, defendant was entitled to apply those credits in liquidation of the bond on either of the pleas.

The bond and interest amounted to	£1925	5	10
The credits in the account, with in-			
terest.....	1329	10	5

Balance due from defendant and E. S.			
independent of subsequent ad-			
vances to defendant alone	£595	15	5

And if the defendant could avail himself of the credit for the flour the bond would be overpaid.

But the court held that the flour could not be set up as a payment—it could only have been evidence under a plea of set-off; and being divided in opinion as to whether the defendant could avail himself of these credits in liquidation of the bond, and not of the subsequent advances to himself, the plaintiffs kept their verdict.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF KING'S BENCH

FROM MICHAELMAS TERM, 10 GEO. IV., TO
EASTER TERM, 1 WM. IV.

ACTION ON THE CASE.

1. The Court will not grant a new trial on the ground of smallness of damages in action for slander. *Atkins v. Thornton*, 239.

2. Action on the case lies as well as trespass for seduction. *Cavan v. Welsh*, 246.

3. No action lies against an heir in this province on the simple contract debt of his ancestor. *Forsyth v. Hall*, 291.

4. In case for disturbing plaintiff's ferry, it is not necessary to prove that defendant claimed or received hire. *Burford v. Oliver*, 9.

AFFIDAVIT.

See PRACTICE, 41.

1. An affidavit made in this province against a party then in the United States, with a view to arrest him on his coming into the province, irregular. *Cozens v. Ritchie*, 167.

2. An affidavit on a promissory note, stating it to be made by defen-

dant to B. W. & Co., omitting to say "payable" to B. W. & Co., is defective. *Andruss v. Ritchie*, 6.

3. In trespass *de bonis asportatis*, an affidavit stating that "defendant took possession of plaintiff's goods and chattels, and still keeps possession thereof," is sufficient to warrant an order to hold to bail. *Ingraham v. Cunningham*, 109.

4. In an affidavit sworn by an illiterate person, the *Jurat* must state that he appeared to understand it. *Moore v. James*, 233.

ADMINISTRATORS AND
EXECUTORS.

See EVIDENCE, 12.

On a return of *devastavit*, a *ca. sa.* does not issue as a matter of course without enquiry. *Willard v. Woolcutt*, 201.

ADVERSE POSSESSION.

See DISSEIZIN.

AMENDMENT.

See PRACTICE, 3, 31.

1. The court allowed a verdict for the penalty of a bail bond to the limits to be amended by reducing it to the sum endorsed on the *ca. sa.* with interest and sheriff's fees, as appeared on the judge's notes. *Callagher v. Strobridge*, 158.

2. The court will not amend a declaration in ejectment by altering the name of the township in which the land for which the action was brought was expressed to lie. *Doe v. Roe*, 162.

3. After issue joined on *nul tiel record*, the court permitted plaintiff to amend his declaration on payment of costs, though there had been a trial. *Church v. Barnhart*, 443.

4. Judgment on *sci. fa.* against an administrator amended in the name of the intestate, by making it correspond with the original judgment. *Willard v. Woolcutt*, 201.

ARREST.

See PRACTICE, 5, 41.

An arrest founded on an affidavit to hold to bail, which was made while defendant was in the United States, in readiness in case he should return to this province, held irregular. *Cozens v. Ritchie*, 167.

APPEARANCE.

If defendant's attorney file common bail for him it is a sufficient appearance. *Grace v. Meighan*, 187.

ATTACHMENT.

See PRACTICE, 10.

1. An attachment goes absolute in the first instance, on affidavit of

service of a rule for payment of costs—demand—and non-payment. *Rowsell v. Hartwell*, 90.

2. To obtain an attachment for non-payment of an award, the affidavit of service and demand should shew that the person making the demand has a power of attorney for that purpose, and that the party of whom the demand was made was apprised of that circumstance. *Powell v. McMartin*, 169.

3. An attachment against a sheriff for not obeying a rule cannot be granted by a judge at chambers. *Rex v. Sheriff of Niagara*, 331.

APPRENTICE.

An indenture of apprenticeship, though contrary to stat. 5 Eliz., c. 4, is not void, but voidable only. *Fish v. Doyle*, 328.

ARREST OF JUDGMENT.

1. It is no ground to arrest the judgment in an action for use and occupation, that the declaration does not shew that A. B. who occupied the premises was tenant to the defendants, or that the defendants held under the plaintiffs. *Moffat v. McCrae*, 11.

2. On the return of a rule *nisi* to arrest the judgment, though no cause be shewn, the court will not make it absolute unless the party moving shew some substantial objection to the record. *Ibid.*

3. The court refused to arrest the judgment in dower on the ground that in the declaration the tenant was said to have been attached and not summoned. *Robinet v. Lewis*, 164.

ASSESSMENTS.

Sale of lands under the as-

sessment law for non-payment of taxes on 1st March 1830. On 1st March 1831, the treasurer being absent from the district, payment of the purchase money and 20 per cent. was made to the deputy-sheriff, who was in the habit of receiving taxes for the treasurer. The court refused a *mandamus* to the sheriff to convey. *In re Sheriff of Newcastle*, 503.

ASSUMPSIT.

1. An attorney is liable in assumpsit to a sheriff for service of writ, without any undertaking at the time the writs are put into the sheriff's hands. *Jarvis v. Washburn*, 163.

2. Assumpsit lies for value of lands sold, and for services rendered in procuring letters patent for a man, by which lands are granted to him in fee simple. *Kilborne v. Forrester*, 332.

ATTORNEY.

See ASSUMPSIT, 1.—EVIDENCE, 19.

1. The court refused to order an attorney to pay the costs of a suit on a bond to the limits, he having signed one of the obligor's names thereto, and executed it on his behalf on a mere parol authority. *Leonard v. Glendennan*, 232.

2. Where a bill is filed against an attorney in vacation, he has four days in the next term to plead. *Macanady v. Foster*, 479.

AWARD.

See PLEADING, 5.—PRACTICE, 15.

Submission to arbitration as set out in the declaration mentioned three defendants, and the award in

reciting that submission only noticed two, but referred to the rule by which the submission was made, as annexed to the award, in which rule the three defendants were named. *Held* that the variance between the submission set out in the declaration and that recited in the award was immaterial, as the submission itself agreed with the declaration. *Hale v. Matthison*, 63.

BAIL.

1. Court will not order an *exoneretur* where bail have surrendered their principal, without the sheriff's certificate is produced. *Linley v. Cheeseman*, 53.

2. In trespass *de bonis asportatis*, an affidavit stating that defendant took possession of plaintiff's goods, and still keeps possession thereof, is sufficient to warrant an order to hold to bail. *Ingraham v. Cunningham*, 109.

3. Where two plaintiffs are of the same name, the non-repetition of the surname after each christian name is not a sufficient irregularity to warrant an assignment of the bail bond being taken. *Meighan et al. v. Brown*, 167.

BAIL BOND TO THE LIMITS.

See DEBT, 1.—CONSOLIDATING ACTIONS, 1.

1. Damages must be assessed on a bail bond to the limits. *Callagher v. Strobridge*, 158.

2. Order for particulars of breaches will be granted in debt on bond for the limits. *Church v. Barnhart*, 213.

3. The court refused to order an attorney to pay the costs of suit on a bail bond to which he had signed

one of the obligor's names, on a mere parol authority. *Leonard v. Glendennan*, 232.

4. A blank had been left at the time of executing a bond for the limits in the condition, which was afterwards, with the obligor's consent, though not in his presence, filled up with the sum endorsed on the *ca. sa.* Held no ground of non-suit. *Leonard v. Merritt*, 281.

BOND.

Where defendant gave a bond, payable at a distant period, and plaintiffs continued their dealings with him, rendering accounts containing debits and credits, and including as the first items in those accounts a sum for which the bond was given, though the last of their accounts was rendered before the bond became due. *Quære*—Can the defendant apply the credits contained in these accounts as payments on the bond? *Maitland v. Secord*, 456.

CERTIORARI.

This writ lies to remove orders of sessions relating to the expenditure of district rates and assessments, at the instance of the Attorney-General, without notice. *Rex v. Justices of Newcastle*, 114.

COMMISSIONER.

The certificate of a commissioner for administering the oath of allegiance is evidence (after his death and that of the party taking the oath) that such oath was administered. *Doe McFarlane v. Lindsay*, 123.

COMPUTATION OF TIME.

See ASSESSMENTS.

CONCURRENT ACTS.

See PLEADING, 5.

CONSIDERATION.

A debt due to a bankrupt estate is a good consideration for notes for that debt, given to the trustees and assignees of the estate. *Gates v. Crooks*, 446.

CONSOLIDATING ACTIONS.

The court granted a rule to consolidate several actions brought on a bond to the sheriff for the gaol limits. *Leonard v. Merritt*, 190.

CORPORATION.

See DISTRINGAS.

1. A stockholder, as such merely, has no right to inspect the stock or other books of the bank, nor will the court grant a *mandamus* for that purpose, although they have the power, unless some special ground be disclosed to warrant it. *In re Bank of Upper Canada*, 55.

2. Process to compel an appearance by the Canada Company cannot be served on their attorneys here, as the directors and common seal are in England. *Cooper v. The Canada Company*, 413.

COSTS.

See PRACTICE, 10.

1. Rule for costs for not proceeding to trial pursuant to notice is absolute in the first instance. *Chisholm v. Simpson*, 2.

2. *Quære*.—Under what circumstances the court will allow costs to a defendant under the provincial statute 48 Geo. III., ch. 4. *Beard v. Orr*, 40.

3. When a plaintiff in an action of covenant recovered only £2, and

the judges did not certify, *held* that he was only entitled to district court costs. *Gardner v. Stoddart*, 94.

4. It is not necessary for defendant to apply for leave to enter a suggestion to deprive plaintiff of King's Bench costs. *Ibid.*

5. On putting off the trial of an information for penalties, at the instance of the defendant, the court will make the payment of costs a condition in like manner as in civil cases. *Rex v. Ives*, 440.

6. The plaintiff recovered a verdict within the jurisdiction of the district court, and as soon as the verdict was recorded the court adjourned; a motion for a certificate, made at the opening of the court on the following morning, *held* too late. *Falls v. Lewis*, 500.

DAMAGES.

See ACTION, 1.—PRACTICE, 29, 30.
—EVIDENCE, 9.

In trespass for mesne profits, defendant may prove, in mitigation of damages, the value of buildings erected on the premises by him. *Lindsay v. McFarling*, 6.

DEBT.

1. In debt on bond to the limits by the assignee of the sheriff, a voluntary return, surrender, or recaption by the sheriff before action brought and before assignment made is no bar. *Evans v. Shaw*, 14.

2. Debt lies on the imperial statute 6 Geo. IV., ch. 114, to recover the penalty, though claimed by the informer for himself and the King, omitting to name the Lieutenant-Governor. *Jones, qui tam v. Chase*, 322.

DEPUTY SHERIFF.

To charge the sheriff with the acts of his deputy done *colore officii*, it is enough to prove the authority of such deputy by general reputation. *Holt v. Jarvis*, 190.

DISSEISIN.

A. and B. received patents for adjoining lots; A. inadvertently occupied, fenced, and improved part of B.'s lot, in the belief that it formed part of his own. Some years after B.'s lot was confiscated under the Alien Act, and sold by the Commissioners for Forfeited Estates. A. and those claiming under him had held the disputed tract upwards of twenty years at the time of action brought, but not twenty years when B. forfeited the estate to the Crown, became seised by inquest of office. *Held* that A.'s occupation did not work a *disseisin* of B., and that B. continued seised so as to entitle the Crown to that portion of the lot in A.'s possession. *Doe v. McDonnell*, 374.

DISTRINGAS.

This writ is not the proper process with which a suit against a corporation aggregate should commence. *Cooper v. Canada Company*, 189.

DOWER.

See PRACTICE, 22, 29, 30.—PLEADING, 3.

1. Demandant in dower may assess as damages her taxable costs on obtaining judgment of *seisin*, executing the writ of *hab. fac. seis.* and her necessary travelling expenses incurred in prosecuting her suit. *Robinet v. Lewis*, 260.

2. An infant demandant may sue for dower; and if an infant be tenant the parol is not allowed to demur. *Phelan v. Phelan*, 386.

EJECTMENT.

See DISSEISIN, 1.—REGISTRY, 1.

The count will not allow a declaration in ejectment to be amended by altering the township in which the lands, for which the ejectment is brought, lie. *Doe v. Roe*, 162.

EVIDENCE.

See AWARD.—NEW TRIAL, 4.—PRACTICE, 28.—DISSEISIN, 1.

1. In trespass for mesne profits defendant may give in evidence, in mitigation, the value of buildings erected on the premises by him. *Lindsay v. McFarling*, 6.

2. In case for disturbing plaintiff's ferry it is not necessary to prove that defendant claimed any payment. *Burford v. Oliver*, 9.

3. In trespass the defence was rested on acting under the Rideau Canal Act. *Held* that defendant should be prepared to prove not only his authority, but that the act complained of was in pursuance of the powers given by that statute. *Phillips v. Redpath*, 68.

4. The certificate of a commissioner for administering the oath of allegiance is evidence after his death and that of the party taking the oath. *Doe v. Lindsay*, 123.

5. In case for libel the truth of defendant's remarks on a report of a trial, and the evidence given thereat, is not admissible under the general issue. *Small v. Mackenzie*, 174.

6. In an action against a sheriff,

for seizing goods, it is sufficient to prove that they were seized *colore officii*, without proving a writ of execution. *Holt v. Jarvis*, 190.

7. And general reputation is sufficient to prove the party seizing deputy-sheriff. *Ibid.*

8. Under a bill of particulars for work and labour, plaintiff may give in evidence an acknowledgment of a specific balance due for work and labour. *Drummond v. Bradley*, 243.

9. In dower, demandant's residence on the premises at the expense of the heir-at-law for part of the time between the death of her husband and the bringing her action, cannot be given in evidence as a set-off to her damages for the detention, though proper to go to the jury in mitigation. *Robinet v. Lewis*, 260.

10. Evidence may be given of a parol agreement to discharge an agreement within the Statute of Frauds. *Mulgrew v. Pringle*, 269.

11. A. agreed to pay B. for a lot of land upon receiving a deed. When B. offered the deed A. declared his inability to pay, and proposed new terms, which were accepted. *Held* that B. was thereby relieved from the necessity of proving a tender of a deed to enable him to sue. *Ibid.*

12. Where the plaintiffs declared as executors, laying promises to the testator in his lifetime, also to the plaintiffs as executors since his death, and an account stated with the plaintiffs as executors, and proved an acknowledgment of the debt to plaintiffs. *Held* unnecessary to produce the probate of the will to establish their representative character. *Dickson v. Markle*, 286.

13. On a traverse of office, a memorial of a mortgage for years, from an alien to the original grantee of the Crown, under whose heirs traverser claimed, is not conclusive evidence of seisin in fee in the alien at the time of the mortgage. *Rea v. Theale*, 318.

14. Under of a plea of "not imported in manner and form," &c., to an information for the condemnation of goods as illegally imported, evidence may be given that they were landed through stress of weather. *Attorney-General v. Spafford*, 320.

15. Evidence of a bond signed by A. and delivered to B., who had received the consideration, is sufficient to take the case out of the Statute of Frauds, although nothing was signed by B., and the action was brought against him on an agreement relating to lands. *Kilborne v. Forester*, 332.

16. The recognition of a bond in a letter from defendant to plaintiff, with proof that a document purporting to be a copy or draft of such an instrument was shown by defendant with the title-deeds of an estate to which it related, affords evidence to go to a jury in proof thereof, after notice by defendant to produce any such bond, copy, or draft. *Rochleau v. Bidwell*, 345.

17. A continuance roll found in the proper office and entered and filed there by the proper officer, is admissible evidence as a record of this court, although not compared with the papers filed in the cause; and parol testimony cannot be received to contradict the roll. *Prentice v. Hamilton*, 398.

18. When a bill of exchange was endorsed by a firm, one of the partners of which resided out of the province, and the endorsee,

conformably to the statute 59 Geo. III., ch. 25, sued the partner residing here; the other partner, although released, is not a competent witness to prove the bill not due to the plaintiff. *Ferrie v. Starkweather*, 413.

19. In an action for money had and received against an attorney, evidence that the judgment under which the money was collected was fraudulently confessed *held* not admissible. *Williams v. King*, 439.

FORCIBLE ENTRY.

See RESTITUTION.

FRAUDS (STATUTE OF).

See EVIDENCE, 15, 16.

An agreement in writing within the Statute of Frauds may be waived or discharged by a subsequent parol agreement. *Mulgrew v. Pringle*, 269.

HEIR.

1. Action does not lie against, on the simple contract debt of his ancestor. *Forsyth v. Hall*, 291.

2. In ejectment between a party claiming as heir and a stranger, slight evidence of pedigree is allowed to go the jury. *Doe v. Chisholm*, 216.

HOUSE OF ASSEMBLY.

See IMPRISONMENT.

INFANT.

See DOWER, 2.

IMPRISONMENT.

The House of Assembly have the power of imprisoning persons

guilty of contempt, in answering or refusing to answer before a select committee. *McNab v. Bidwell*, 144.

INSOLVENT DEBTORS.

See PRACTICE, 8, 18.

Payment of the weekly allowance to a person acting as turnkey is good. *Hyde v. Barnhart*, 53.

INSPECTION OF BOOKS.

See CORPORATION, 1.

INFORMATION.

See DEBT, 2.—EVIDENCE, 14.—COSTS, 5.

INTEREST.

See USURY.

JUSTICES OF THE PEACE.

Cannot apply the funds of a district towards building a new gaol and court-house, without an act of parliament specially conferring that authority on them.—*Rex v. Justices of Newcastle*, 204.

KING'S BENCH COSTS.

See COSTS, 3.—PRACTICE, 23.

LANDS AND TENEMENTS.

Held in fee simple by a debtor at the time of his decease, may be legally taken in execution on a judgment against his executor or administrator. *Forsyth v. Hall*, 291.

LIBEL.

See EVIDENCE, 5.

LIMITATIONS (STATUTE OF).

Does not run against a plaintiff

absent from the province at the time the cause of action accrues until he comes here. *Forsyth v. Hall*, 291.

MANDAMUS.

See ASSESSMENT.

The court will not grant a *Man- damus* to permit a stockholder to examine the books of a bank, unless some special reasons be assigned. *In re Bank of Upper Canada*, 55.

MESNE PROFITS.

In trespass for, defendant may give in evidence in mitigation of damages, the value of buildings erected on the premises by him. *Lindsay v. McFarlane*, 6.

NEW TRIAL.

1. New trial refused in case for slander, where damages were complained of as too small. *Atkins v. Thornton*, 239.

2. The court will not grant a new trial because the defendant's attorney had omitted to give a notice to produce a deed, by which omission defendant was precluded from going into one branch of his defence, when the facts, if proved, would not have formed a legal bar to the action. *Gates v. Crooks*, 446.

3. *Quære*.—Where the judge who tried a case has omitted to note the evidence of an important fact—which he charged the jury was proved, and upon which their verdict was founded—whether, after affidavit that such fact was actually proved though it did not appear by the judge's report of the evidence, the court will grant a new trial? *Winchester v. Cornell*, 60.

4. After a demurrer had been

decided which admitted the facts which were found by the jury on a trial of issues, the court refused a new trial, which was applied for on the ground that the verdict was against evidence. *Ives v. Hitchcock*, 480.

NON-SUIT.

See BAIL-BOND FOR THE LIMITS, 4.

Where a cause was called on for trial at *nisi prius*, neither counsel or attorney for plaintiff appearing, a jury may be sworn and a non-suit ordered. *Falls v. Lewis*, 269.

NUL TIEL RECORD.

After issue joined on *nul tiel record* and a trial, the court permitted the plaintiff to amend his declaration. *Church v. Barnhart*, 443.

ORDERS OF JUSTICES.

Orders in session, relative to the expenditure of district rates may be removed by *certiorari*. *Rex v. Justices of Newcastle*, 114.

PARTNER.

See EVIDENCE, 18.—PRACTICE, 41.

PARTICULARS OF DEMAND.

See PRACTICE, 40.

In debt on bond to the limits, particulars of breaches will be ordered to be given. *Church v. Barnhart*, 213.

PEDIGREE.

See HEIR, 2.

PLEADING.

1. In an action for use and occupation, an averment that one A. B. occupied at the special instance and request of defendant, held a sufficient allegation of a permission by plaintiff to occupy. *Mcffatt v. McCrea*, 11.

2. In an action by the assignee of the sheriff of a bond to the limits, a voluntary return or a surrender, or a re-capture by the sheriff, before action and before assignment of bond, no plea in bar. *Evans v. Shaw*, 14.

3. In dower the replication to a plea of *alien ne* need not lay a *venue* as to the place of birth within the allegiance, nor state of what parent or when the demandant was born, and is properly concluded to the country. *Alien ne* may be pleaded in bar. *Robinet v. Lewis*, 44.

4. In an action on a promissory note, the declaration must aver presentment for payment at the place where the note is made payable. *Ferrie v. Rykman*, 61.

5. In debt on award, an award that defendant should pay to plaintiff £149 on 5th January, and plaintiff should deliver up a house in his possession on 5th January, held concurrent acts, and plaintiff's readiness to fulfil his part is a necessary averment. *Baker v. Booth*, 65.

6. In covenant, plaintiffs agreed to deliver 200 toises of stone for the building of a wall—defendant to pay 6s. 9d. per toise, *i.e.*, for every 216 feet cubic measure, when the wall was erected; plaintiffs averred delivery of 195 toises laid in the wall, but omitted to aver how many toises at the rate of 216 cubic feet to a toise in the wall. Held bad on demurrer. *Howe v. Newman*, 90.

7. In debt on bond conditioned to pay rent; a plea that before rent became due plaintiff assigned to A. B., to whom defendant paid; *held* good on demurrer. *McDougall v. Young*, 111.

8. Trespass for taking, impounding, and selling plaintiff's horses; plea, that horses were *damage feasant*. Replication, that by town meeting regulations fences should be five feet high, and that defendant's fences not being that height, but ruinous and out of repair, plaintiff's horses escaped out of his close into defendant's close, without the knowledge and consent of plaintiff. *Held* good on general demurrer. *Ives v. Hitchcock*, 247.

9. Debt on bond to gaol limits, a blank had been left at the time of execution in the condition, which was afterwards, and with the obligor's assent (though not in his presence) filled up with the endorsement on the *ca. sa.*; plea, *non est factum*. Defendant held liable. *Leonard v. Meritt*, 281.

10. A plea to an information for the condemnation of goods as being illegally imported; that "they were not imported *modo et forma*" is sustained by evidence that the vessel put into port, and that the goods were landed through stress of weather. *Attorney-General v. Spafford*, 320.

POSTAGE.

On a letter carried by inland navigation from one post town to another, must be charged according to the distance the letter is actually carried, and not according to the distance by the post road between the two places. *Dickson v. Crooks*, 117.

PRACTICE.

1. Where plaintiff appears by statute for defendant, a rule to plead cannot be dispensed with. *Bergin v. Thompson*, 1.

(Rescinded by rule of court, Easter, 11 Geo. 4).

2. No paper is properly filed until marked "filed" by the proper officer. *Campbell v. Madden*, 2.

3. Where a writ is bailable the court will not amend an original *ca. re.* by making it a *testatum*, though a *præcipe* for a *testatum* is filed. *Campbell v. Hepburn*, 3.

4. The master is not to refuse to tax K. B. costs, merely because the verdict is within the district court jurisdiction, although the judge who tried the cause has not certified. *McMurray v. Orr*, 3.

5. The word "*payable*" being omitted in an affidavit to hold to bail on a promissory note, the arrest was set aside. *Andruss v. Ritchie*, 6.

6. The court will not grant leave to enter an *exoneretur* when bail have surrendered their principal, without a certificate from the sheriff. *Linley v. Cheeseman*, 53.

7. Payment of weekly allowance to a person acting as turnkey is a good payment to the debtor. *Hyde v. Barnhart*, 53.

8. After a rule for weekly allowance, plaintiff cannot file fresh interrogatories, and suspend the payment, although he hear of property supposed to have been made away of which at the time of filing the first interrogatories he had no knowledge. *Semble, ibid.*

9. The court revived a lapsed rule *nisi*, upon affidavit that it had been served and transmitted but

mislaid, and did not arrive until after term. *Johnson v. Durand*, 63.

10. An affidavit made of a rule for payment of costs served, and demand, the court will make the rule for attachment for non-payment absolute in the first instance. *Rowse v. Hartwell*, 90.

11. Rule *nisi* for judgment in case of a non-suit for not going to trial discharged on peremptory undertaking—plaintiff failing to go to trial, rule *nisi* made absolute in the first instance. *Benham v. Shaw*, 113.

12. In debt on bond to the limits--damages must be assessed. *Callagher v. Strobridge*, 158.

13. When a demurrer has been argued and judgment pronounced, it cannot be withdrawn if a trial has been lost, although plaintiff would have to assess his damages. *Bell v. Stewart*, 159.

14. Two plaintiffs named M. The non-repetition of the surname after each christian name is not a sufficient irregularity to warrant the taking an assignment of a bail-bond. *Meighan v. Brown*, 167.

15. When a cause was referred to arbitration, on a verdict taken by consent, and the award being made in vacation, final judgment was entered before the first day of next term; the proceedings were held irregular. *Vincent v. McLean*, 168.

16. When a plaintiff abandons all the counts in his declaration but one, and obtains a verdict on that on the defendant, is not entitled, as of course, to a verdict on the rest. *Gates v. Crooks*, 180.

17. Several actions brought on a bond to the limits may be consolidated. *Leonard v. Merritt*, 190.

18. When a defendant, after obtaining his weekly allowance, takes the benefit of the limits, he must give notice of his return to close custody, before he is entitled to further payment. *Hyde v. Barnhart*, 201.

19. The court allowed a judgment on *sci. fa.* against an administrator, to be amended in the name of the intestate, by making it correspond with the original judgment. *Willard v. Woolcut*, 201.

20. On a return of *devastavit*, a *ca. sa.* does not issue as a matter of course without enquiry. *Ibid.*

21. The court will not on motion set aside special pleas, amounting to the general issue, but leave the party to his demurrer. *Truax v. Christy*, 213.

22. In dower a suggestion may be entered after final judgment that the husband died seised of lands, and enquiry shall go concerning the damages since the period of his death, though the tenant is the alienee of the heir. *Robinet v. Lewis*, 228.

23. Where defendant resided in one district, plaintiff in a second, and a material witness in a third, the court allowed K. B. costs, though the *cognovit* was given for a sum within the district court jurisdiction, issue being joined. *Hugill v. Driscoll*, 234.

24. A rule to return a *fi. fa.* cannot issue out of the office of the deputy-clerk of the Crown in an outer district. *Anonymous*, 234.

25. According to the old practice, a bail piece must have been transmitted from the country to a judge K.B. *Whitney v. Stone*, 235.

26. After service of a demand of

replication, rejoinder, &c., a party desirous of having further time must obtain a rule of court or judge's order for that purpose. *Small v. Mackenzie*, 241.

27. The court will not discharge a prisoner in execution when the plaintiff died, and the weekly allowance was tendered by a person who had usually paid it, although no administration was granted for some time. *Beard v. Orr*, 40.

28. A demand is necessary before suing a sheriff for overplus of money levied under an execution. *Ruggles v. Beikie*, 244.

29. On a writ of enquiry in dower, the mesne value of the premises, between the death of the husband and judgment obtained, should be assessed. *Robinet v. Lewis*, 260.

30. The demandant may assess as damages her taxable costs, on obtaining judgment of seisin, of executing the writ of *hab. fac. seiz.* and her necessary travelling expenses incurred in prosecuting her suit. *Ib.*

31. After verdict for plaintiff and contingent damages assessed, judgment was given for defendant on demurrer. The court refused to allow the plaintiff to amend his replication. *Phillips v. Smith*, 290.

32. Lands and tenements of a deceased debtor may be taken in execution on a judgment against his executor. *Forsyth v. Hall*, 291.

33. When notice of intention to move on the ground of irregularity is required in England to be given two days before the execution of the writ of enquiry, a similar notice shall be given in this court not later than the first day of the assizes, at which damages are to be assessed. *Dougall v. McLean*, 318.

34. When defendant had an attorney on whom service of several papers had been made, the court set aside an assessment of damages, the notice having been served on defendant only. *Ferrie v. Tannahill*, 327.

35. A *ca. re.* is not the first and original process in this country in real actions, as dower. *Phelan v. Phelan*, 386.

36. In dower fifteen days must intervene between the teste and return of the summons. *Ibid.*

37. An attachment against a sheriff for not obeying a rule to bring in the body cannot be granted by a judge at chambers. *Rea v. Sheriff of Niagara*, 331.

38. A writ of *replevin* with a *justicies* clause is irregular. *Cornell v. Quick*, 427.

39. The court will not interfere to reduce the sum endorsed to levy on a *fi. fa.* on a strict legal ground, unless the defendant has an equitable ground to sustain his application. *Maitland v. Secord*, 456.

40. A party has the same time to plead after particulars delivered on a judge's order, as he had after the summons was returnable. *Washburn v. Fothergill*, 476.

41. Where the plaintiff in his affidavit of debt swore that two persons, trading under the name and firm of T. & Co., were indebted to him and sued out process against one only, the other being within the jurisdiction of the court. The arrest was set aside. *Chisholm v. Ward*, 478.

42. If a bill is filed against an attorney in vacation, he has the four first days of the following term to plead. *Macanady v. Foster*, 479.

43. A rule for judgment as in

case of nonsuit having been discharged on the terms of entering into a peremptory undertaking, and paying costs, the court in the following term, on affidavit that the costs were not paid, made the original rule absolute in the first instance. *Bergin v. Whitehead*, 510.

PREROGATIVE.

The Attorney-General, on behalf of the Crown, has a right to remove orders of sessions relative to the expenditure of district rates, by *certiorari* at any time. *Rex v. Justices of Newcastle*, 114.

PROCESS.

See CORPORATION, 2.

1. A writ of *distringas* is not the proper process by which a suit against a corporation aggregate should be commenced in this province. *Cooper v. Canada Company*, 189.

2. The process of this court can only be served by the sheriff or his officers. *Whitehead v. Fothergill*, 200.

3. Process to compel the appearance of the Canada Company cannot be served on the Commissioner here. *Cooper v. Canada Company*, 413.

PRIVILEGED COMMUNICATION.

Where defendant, a clerk in the Receiver-General's Office, told his principal that the plaintiff, another clerk, had robbed him (the R. G.) of money; there being no proof that any money had been stolen, or that the Receiver-General had ever suspected it, *held* that such communication was not privileged. *Prentice v. Hamilton*, 398.

PROMISSORY NOTE.

See PLEADING, 4.—USURY, 1.

A debt due to a bankrupt estate is a good consideration for promissory notes given to the assignees and trustees of the estate. *Gates v. Crooks*, 446.

QUI TAM.

In debt for penalties on the imperial statute 6 Geo. IV., c. 114, which gives the penalty one-third to the King, one-third to the Lieutenant-Governor, and one-third to the informer; the court refused to arrest the judgment, because the plaintiff claimed the penalty for himself and the King only. *Jones, q. t. v. Chace*, 322.

REGULÆ GENERALES.

89, 170, 230, 512.

REGISTER.

Where A. being seised of real estate, under a registered title conveyed to B. and died, and A.'s heir-at-law conveyed the same premises to C. who had his deed registered immediately. *Held* that the deed last registered is fraudulent and void, as against the deed first registered, though C. had notice of this deed when he purchased. *Doe v. Mitchiner*, 471.

RIDEAU CANAL ACT.

If defendant rest his defence on his acting under this statute, he should be prepared to prove that the act he justifies was regularly done under the statute, and not rely merely on his being employed in the construction of the canal. *Phillips v. Redpath*, 68.

REPLEVIN.

See PRACTICE, 38.

RESTITUTION.

The court refused a writ of restitution after a conviction of forcible entry and detainer, where the premises were a Crown reserve the lease of which had expired. *Rex v. Jackson*, 50.

SECURITY FOR COSTS.

Defendant's attorney entering common bail is a good appearance to sustain a motion for security for cost. *Grace v. Meighan*, 187.

SCIRE FACIAS

See AMENDMENT, 4.

Judgment on *sci. fa.* against B. the heir of the deceased owner of land, and a *fi. fa.* thereon, awarding the sale of lands of which the deceased was seised on a specified day, previous to which he had died, will not sustain a purchase, and a sheriff's deed under such judgment and *fi. fa.* gives no title. *Varey v. Muirhead*, 486.

SLANDER.

See ACTION, 1.—EVIDENCE, 5.

SHERIFF.

See EVIDENCE, 6, 7.

1. Process can only be served by a sheriff or one of his officers. *Whitehead v. Fothergill*, 200.

2. In an action against a sheriff for overplus of money levied on a *fi. fa.* a demand before commencing the suit is necessary. *Ruggles v. Beikie*, 244.

STATUTES.

Semble 5 Eliz. c. 4, is not in force in this province. *Fish v. Doyle*, 328.

SUGGESTION.

In dower a suggestion may be entered after final judgment, that the husband died seised of lands. *Robinet v. Lewis*, 228.

TRIAL.

When neither plaintiff's counsel or attorney appears at *nisi prius*, when the cause is called, a jury may be impaneled, and the plaintiff non-suited if the defendant appear. *Falls v. Lewis*, 269.

USURY.

Notes given bearing interest from a period antecedent to their date are not usurious on that account, when it appears that the debt for which such notes were given was due at the time from which interest is computed. *Gates v. Crooks*, 446.

VARIANCE.

See AWARD, 1.

VENUE.

See PLEADING, 3.

VERDICT.

If a plaintiff at a trial abandons all the counts in his declaration but one, on which he obtains a verdict, the defendant is not entitled to a verdict on the other counts. *Gates v. Crooks*, 180.

WEEKLY ALLOWANCE.

See INSOLVENT DEBTOR, 1.

WITNESS.

See EVIDENCE, 18.



